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No.

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ROBERT PELTIER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-19a) is not yet reported.

JURISDICTION

The *en banc* judgment of the court of appeals (App. B, *infra*, pp. 20a-21a) was entered on May

9, 1974. On June 3, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures, and that the evidence seized as a result of the search must be excluded at trial—should be applied retroactively to require the exclusion of evidence seized in similar searches conducted prior to the date of that decision.

STATEMENT

On March 7, 1973, an indictment was returned in the United States District Court for the Southern District of California charging that respondent had knowingly and intentionally possessed, with intent to distribute, approximately 270 pounds of marihuana, in violation of 21 U.S.C. 841(a)(1). Respondent's subsequent motion to suppress evidence was denied after a hearing. On May 17, 1973, after respondent waived his right to a jury trial, the case was submitted to the district court on the basis of stipulated facts and the transcript of the suppression hearing,

and the court found respondent guilty as charged. Respondent was sentenced to imprisonment for one year and one day, with immediate eligibility for parole pursuant to 18 U.S.C. 4208(a)(2), and to a special parole term of two years pursuant to 21 U.S.C. 841(b)(1)(B). The court of appeals, sitting *en banc*, reversed the judgment of conviction in a 7-6 decision and remanded the case to the district court with instructions to suppress the evidence seized in the search of respondent's automobile (App. A, *infra*, pp. 1a-19a).

1. It was stipulated at trial that respondent knowingly and intentionally possessed, with intent to distribute, the 270 pounds of marihuana that were discovered in his automobile by Border Patrol officers on February 28, 1973.[1] The facts surrounding the seizure of the marihuana were adduced at the suppression hearing through the testimony of the two Border Patrol officers who participated in the stop and search of respondent's vehicle. Respondent presented no evidence at the hearing.

Border Patrol Agent Charles Ainscoe testified that he and Agent William Pfiester were conducting a roving immigration patrol near Temecula, California, at about 2:30 A.M. on February 28, 1973, when they observed respondent traveling north on Highway 395, approximately 70 air miles from the Mexican

[1] The stipulation also stated that it "would not [have been] entered into had the defendant's motion to suppress in the case been granted" (Clerk's record, p. 24).

border (Tr. 5-6, 16).[1a] The officers knew that the road is frequently used by smugglers to transport aliens who have entered the country illegally (Tr. 8), and their suspicions were aroused because respondent was driving an old model car and appeared to be of Mexican descent (Tr. 16, 23).[2] They therefore pursued and stopped respondent in order to inspect his vehicle for the presence of concealed aliens (Tr. 7-8).

As Agent Ainscoe approached the vehicle, he observed that it bore out-of-state license plates, that respondent was alone in the car, and that there were some clothes in the back seat (Tr. 8, 17). He informed respondent that he was conducting a "routine immigration inspection," and he asked respondent to open the trunk of the car (Tr. 8). As respondent unlocked the trunk, Ainscoe observed that the key had attached to it a tag like those frequently used for rental vehicles (Tr. 9).

When the trunk was opened, the officer could see several suitcases and several plastic garbage bags (Tr. 10). The plastic bags appeared to the officer to contain kilo-size, rectangular bricks of marihuana (Tr. 11-13). "[T]hey were full of marijuana kilos, and they were pretty easily seen, they weren't symmetri-

[1a] When the officers observed him, respondent was approximately a mile and a half north of a fixed immigration checkpoint, which was not in operation at the time (Tr. 7). "Tr." refers to the reporter's transcript of the April 16, 1973, hearing on respondent's motion to suppress.

[2] The district court found that, while respondent "apparently * * * is of French extraction based upon his name, he does look to be dark-skinned and at night, that could easily be the case, that he would appear to be of Mexican descent" (Tr. 35).

cal, the edges were sticking out every which way" (Tr. 11). Ainscoe had seen marihuana bricks on 20 or 30 prior occasions, including instances when the bricks had been packed in plastic garbage bags (Tr. 12). As he reached into the back of the trunk to inspect the bags, the officer detected the odor of marihuana (Tr. 13), which he had previously smelled "dozens of times" (Tr. 22). He then tore open the bags and discovered the marihuana that respondent was charged with possessing (Tr. 13-14, 36).

2. In his motion papers and at the suppression hearing, which preceded this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, respondent conceded that existing case law supported the Border Patrol's authority to stop and search vehicles for aliens without a warrant or probable cause. He argued, however, that, when the officer saw that the trunk contained no aliens, his authority ended and he could conduct a further search only if he had probable cause to do so. Respondent claimed that the officer's observation of the plastic garbage bags did not give him probable cause to believe that they contained contraband.

The district court denied the motion. It found that, in light of the officer's "experience in his job" (Tr. 36), he had probable cause to inspect the garbage bags "even before he smelled the marijuana, when he saw these protruding objects which, to him, resembled brick-shaped objects of marijuana" (Tr. 36-37).

3. On appeal, the government acknowledged that the search and seizure in this case was similar to the one declared unlawful by this Court in *Almeida-Sanchez*. We argued, however, that the ruling in *Almeida-Sanchez* should not be applied retroactively to searches conducted prior to June 21, 1973, the date of the decision in that case.

A divided court of appeals held that the rule of *Almeida-Sanchez* "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (App. A, *infra*, p. 1a).[3] The majority concluded that the question of retroactivity was not truly presented, because *Almeida-Sanchez* "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (*id.* at 5a). The court conceded that several of its own pre-*Almeida-Sanchez* opinions since 1961, upholding the validity of warrantless *checkpoint* searches for aliens, "contain some dicta from which the government might infer that this Court would uphold a roving-patrol search" (*id.* at 6a, n. 2). It also acknowledged that it had expressly held in 1970 that "government agents on roving patrol can stop and search automobiles without either probable cause or warrant" (*id.* at 6a). *United States* v. *Miranda*, 426 F. 2d 283.

The majority reasoned, however, that "our line of decisions, and that of the Court of Appeals for the

[3] The court specifically reserved the question whether *Almeida-Sanchez* would apply in the case of a collateral attack upon a final conviction (App. A, *infra*, p. 1a).

Tenth Circuit * * *, permitting roving searches by the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court" (*id.* at 7a). The court therefore concluded (*id.* at 9a):

> The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez*, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.[4]

The six dissenting judges, noting that both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* recognized that the decision was a departure from the existing law in each of the three courts of appeals whose jurisdiction includes the Mexican border area (*id.* at 12a-13a),[5] concluded that, even under the majority's standards, "the rule of *Almeida-Sanchez*

[4] The court of appeals held in another *en banc* decision announced the same day as the present case (*United States* v. *Bowen*, C.A. 9, No. 72-1012, pending on petition for a writ of certiorari, No. 73-6848) that the rule of *Almeida-Sanchez* does not apply to searches at fixed checkpoints conducted prior to this Court's decision in *Almeida-Sanchez*. The court of appeals stated in *Bowen* (slip op. at 26) that, as applied to checkpoint searches, *Almeida-Sanchez* "overrules clear past precedent, both statutory and case law," and "disrupts a practice long accepted and widely relied upon."

[5] Mr. Justice Powell stated: "Roving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated that the courts "have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today" (*id.* at 298).

is new" (*id.* at 13a) and the question of retroactivity must therefore be decided. The dissenting opinion reasoned that *Almeida-Sanchez* overruled established law, decisional as well as statutory,[6] concerning the Border Patrol's authority to conduct roving patrol checks of vehicles for aliens (*id.* at 13a-14a); that the prior law, though much of it was stated in dicta, had been "widely relied upon" (*id.* at 17a), and the "law enforcement practice, authorized for over a decade," had been "long accepted" (*id.* at 17a-18a); and that the result in *Almeida-Sanchez* "was not foreshadowed" (*id.* at 16a).

The dissenting judges therefore reached the question of retroactivity and, on the basis of the standards established by this Court in *Stovall* v. *Denno*, 388 U.S. 293, concluded that the deterrent purpose of the exclusionary rule would not be served by applying *Almeida-Sanchez* to roving patrol searches conducted prior to June 21, 1973 (App. A, *infra*, pp. 18a-19a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals squarely conflicts with the recent decision of the Court of

[6] Under 8 U.S.C. 1357(a), immigration officers are given "power without warrant—* * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." By regulation the term "reasonable distance" has been given an outside limit of "100 air miles from any external boundary" (8 C.F.R. 287.1(a)(2)).

Appeals for the Fifth Circuit in *United States* v. *Miller*, 492 F. 2d 37. In *Miller*, as in the present case, Border Patrol officers made a roving patrol stop of an automobile and asked the driver to open the trunk. When the driver said he did not have a key for the trunk, one of the officers opened the rear door of the car to identify some bulky items he had noticed in the back of the car. At that point, he detected the odor of marihuana. After the driver and the car were taken to the Border Patrol office, marihuana was found in the trunk of the car.

The search in *Miller*, like the search in this case, antedated this Court's decision in *Almeida-Sanchez*, and the issue was "whether *Almeida-Sanchez* should be given retrospective application" (492 F. 2d at 40).[7] The court held that the decision "should be given only prospective application" (*id.* at 42). The court's reasoning, which we believe is correct, is directly contrary to that of the majority of the court of appeals in the present case and in harmony with that of the dissenting opinion. "It is clear," the court stated, "that *Almeida-Sanchez* announced a 'new rule'" overturning "an unbroken line of decisions by this Court" (*id.* at 40, 41). The decision established "a new exclusionary rule which law enforcement officials could not have foreseen" (*id.* at 41).

[7] The court of appeals had previously upheld the search and seizure (477 F. 2d 595), but this Court had granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Almeida-Sanchez* (414 U.S. 896).

Looking, therefore, to the standards established by this Court in decisions concerning the retroactivity of new applications of the exclusionary rule in the context of Fourth Amendment violations, the court of appeals concluded that the deterrent purpose of the ruling in *Almeida-Sanchez*, the justifiable reliance of law enforcement officers on the prior rule, and the likely impact of retroactivity on the administration of justice suggest that *Almeida-Sanchez* should apply only to roving patrol searches conducted after June 21, 1973.

The Fifth Circuit subsequently held, relying upon *Miller*, that *checkpoint* searches conducted prior to *Almeida-Sanchez* are also unaffected by that decision. *United States* v. *Cook*, 492 F. 2d 747; *United States* v. *Merla*, 493 F. 2d 910 (referring to *Miller* as the court's "definitive opinion"). In another case, involving a roving patrol *stop* that led to probable cause before a search was conducted, the Fifth Circuit refused "to apply the teaching of *Almeida-Sanchez* to the facts of this case," because under *Miller* "the constitutional enlightenment provided by *Almeida-Sanchez* should not be applied to the analysis of official action occurring prior to the date of that opinion." *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169.[8]

[8] The majority in the present case referred to three other decisions in which panels of the Fifth Circuit applied *Almeida-Sanchez* to searches conducted prior to the date of that decision (App. A, *infra*, p. 11a). Each was decided before *Miller*, and none contained any mention of the retroactivity issue. The panel that decided *United States* v. *Byrd*, 483 F. 2d 1196 (a roving patrol search case), subsequently granted the government's petition for rehearing, withdrew its initial opinion, and, acknowledging the authority of *Miller*, "abandon[ed] any reliance upon *Almeida-Sanchez*" (No. 73-1426, issued May 28, 1974). (The panel nevertheless reached the same result on the authority of other decisions, and the case is pending on the government's renewed petition for rehearing.)

United States v. *Speed*, 489 F. 2d 478 (a checkpoint search case), is pending on the government's petition for rehearing. A petition for rehearing in *United States* v. *McKim*, 487 F. 2d 305 (a roving patrol search case), was denied by the panel prior to the decision in *Miller*.

The Court of Appeals for the Tenth Circuit, though it has not decided the retroactivity of *Almeida-Sanchez* as applied to roving patrol searches, has held, incorrectly in our view, that the principles of that decision apply to checkpoint searches occurring prior to June 21, 1973, if the defendant preserved the issue at trial and on direct appeal. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court's reasoning—that one who has raised the issue and whose case was pending at the time of this Court's decision should "be given the same relief as has been afforded in *Almeida-Sanchez*" (485 F. 2d at 359)—would appear to extend to roving patrol searches as well.

2. The conflict should be resolved by this Court. There are approximately 40 cases pending in the courts of appeals and a large but indefinite number pending in the district courts which involve the validity of warrantless roving patrol searches of vehicles conducted prior to June 21, 1973. The outcome of each of those cases may turn on whether *Almeida-Sanchez* applies retroactively. Many more cases would be affected if the decision in the present case were applied in the context of collateral attacks upon final convictions (see note 3, *supra*). Fair and effec-

tive administration of justice requires a definitive resolution of the issue.

3. In view of the importance of the question, the clear conflict between the courts of appeals, and the thorough treatment of the question by the dissent below and the Fifth Circuit in *Miller*, we do not here argue at length the merits of the retroactivity issue. We note, however, that in determining the retrospective or prospective effect of a new decision, this Court has repeatedly emphasized that "the purpose to be served by the new constitutional rule" is "[f]oremost" among the relevant considerations (*Desist* v. *United States*, 394 U.S. 244, 249). "This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule" (*ibid.*), because "the rule's prime purpose is to deter future unlawful police conduct" (*United States* v. *Calandra*, No. 72-734, decided January 8, 1974, slip op. at 9).

Although *Almeida-Sanchez* did not overrule a prior decision of this Court (cf. *Gosa* v. *Mayden*, 413 U.S. 665, 673), it was "a clear break with the past" (*Desist* v. *United States*, *supra*, 394 U.S. at 248). The Border Patrol, relying on explicit statutory authority to stop and search vehicles for aliens within a reasonable distance of the border (see note 6, *supra*) and on repeated and uniform judicial approval of the practice, had for many years conducted routine roving patrol operations in the border area. These operations were conducted in complete good faith, in the reasonable belief that they were entirely lawful. This long accepted practice and the law upon which

it rested cannot, we submit, properly be dismissed as "an aberration" (App. A, *infra*, p. 9a).

Almeida-Sanchez announced a new rule. No important purpose would be served by applying that rule to exclude evidence seized prior to the decision in the course of a search that the law enforcement officers reasonably believed was lawful. On the contrary, such application would be inconsistent with the purposes of the exclusionary rule and at odds with the principles of retroactivity of new Fourth Amendment rulings that have been developed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2509

UNITED STATES OF AMERICA, APPELLEE

vs.

JAMES ROBERT PELTIER, APPELLANT

[May 9, 1974]

Appeal from the United States District Court for the Southern District of California

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Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, Circuit Judges.

GOODWIN, Circuit Judge:

James Robert Peltier's appeal has been taken en banc so the full court can consider whether the rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), *rev'g* 452 F. 2d 459 (9th Cir. 1971), should be applied to similar cases pending on appeal [1] on the date the Supreme Court's decision was announced. We hold that it

should, reverse Peltier's conviction, and remand the matter to the district court.

Peltier was convicted of possessing marijuana, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The evidence was discovered during a search conducted on February 28, 1973, by border-patrol agents on roving patrol on Highway 395 near Temecula, California.

On June 21, 1973, the Supreme Court, in its opinion reversing this court's *Almeida-Sanchez* opinion, held that border-patrol agents on roving patrol cannot stop and search automobiles pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1 without probable cause or warrant.

The search in question here was of the same type as that condemned in *Almeida-Sanchez*. There, the search was conducted 25 miles north of the Mexican border, on a California east-west highway that lies at all points at least 20 miles north of the border. 413 U.S. at 267-68, 273. Here, the search was conducted approximately 70 air miles north of the Mexican border and well to the north of the San Diego metropolitan area. The government concedes that the evidence must be suppressed if the rule announced in *Almeida-Sanchez* applies to this case.

Until *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Supreme Court traditionally applied new constitutional criminal-procedure standards retroactively

[1] We do not have before us the question of the effect of *Alameda-Sanchez* upon a conviction being tested in a collateral attack, and we express no opinion upon that.

in all cases. 381 U.S. at 628. *See generally* Haddad, *"Retroactivity Should be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. Crim. L., C. & P.S. 417, 425-26 (1969); Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 56-57 (1965). In *Linkletter* the Court was required to decide whether *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which overruled *Wolf* v. *Colorado*, 338 U.S. 25 (1949), should be given retroactive effect. After reviewing the history and theory of the problem of retroactivity, the Court concluded that the Constitution neither prohibits nor requires that the Court's decisions be applied retroactively. In each case the Court must determine whether retroactive or prospective application is appropriate. *Linkletter* v. *Walker*, 381 U.S. at 629.

In *Linkletter's* successors the Court devised a three-point test to determine whether or not to apply a new constitutional doctrine retroactively. The test looked to (a) the purpose to be served by the new standards, (b) the extent of reliance by law-enforcement officials on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. *See Stovall* v. *Denno*, 388 U.S. 293, 297 (1967).

However, for the doctrine of retroactivity to be relevant at all, the Court must have articulated a new doctrine.

> "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the

> web of the law. The issue is presented only when the decision overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon * * *." *Milton* v. *Wainwright*, 407 U.S. 371, 381-82, n.2 (1972) (dissenting opinion of Mr. Justice Stewart) (citations omitted).

See also Gosa v. *Mayden*, 413 U.S. 665, 672-73 (1973); *Michigan* v. *Payne*, 412 U.S. 47, 50-51 (1973); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971); *Williams* v. *United States*, 401 U.S. 97, 106 (1971).

Linkletter itself fits into the first category—decisions overruling "clear past precedent"—since it involved the retroactivity of *Mapp* v. *Ohio*, *supra*, which overruled *Wolf* v. *Colorado*, *supra*. *See also Williams* v. *United States*, *supra*, involving the retroactivity of *Chimel* v. *California*, 395 U.S. 752 (1969), which reversed *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947); *Fuller* v. *Alaska*, 393 U.S. 80 (1968) (per curiam), involving the retroactivity of *Lee* v. *Florida*, 392 U.S. 378 (1968), which overruled *Schwartz* v. *Texas*, 344 U.S. 199 (1952); *Desist* v. *United States*, 394 U.S. 244 (1969), involving the retroactivity of *Katz* v. *United States*, 389 U.S. 347 (1967), which specifically rejected *Goldman* v. *United States*, 316 U.S. 129 (1942), and *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Tehan* v. *Shott*, 382 U.S. 406 (1966), involving the retroactivity of *Griffin* v. *California*, 380 U.S. 609 (1965),

which overruled *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

Representative of cases within the second category —decisions disrupting "a practice long accepted and widely relied upon"— is *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), which held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), would not apply retroactively. The Court in *Johnson* observed that prior to *Miranda* and *Escobedo* it had expressly declined to condemn an entire process of in-custody interrogation solely because police had failed to warn accused persons of their rights or had failed to grant them access to outside assistance, and that law-enforcement agencies had relied upon the Court's acquiescence. 384 U.S. at 731. *See also Gosa* v. *Mayden*, *supra*, involving the retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Adams* v. *Illinois*, 405 U.S. 278 (1972), involving the retroactivity of *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Halliday* v. *United States*, 394 U.S. 831 (1969) (per curiam), involving the retroactivity of *McCarthy* v. *United States*, 394 U.S. 459 (1969); *Stovall* v. *Denno*, *supra*, involving the retroactivity of *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 218 (1967).

Almeida-Sanchez, by contrast, neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice. Mr. Justice Stewart's opinion for the Court, after reviewing the Court's automobile-search decisions and its administrative-inspection decisions, concluded that neither line of authority

"provide[s] any support for the constitutionality of the stop and search in the present case * * *." 413 U.S. at 272.[2] Clearly, then, *Almeida-Sanchez* overruled no earlier Supreme Court precedent; rather, it reaffirmed well-established Fourth Amendment standards dating back to *Weeks* v. *United States*, 232 U.S. 383 (1914), and *Carroll* v. *United States*, 267 U.S. 132 (1925).

Nor did *Almeida-Sanchez* disturb a long-accepted and relied-upon practice. Although the government claims that it has relied upon judicial approval of roving searches prior to June 21, 1973, it has cited only one of our opinions, prior to our overruled decision in *Almeida-Sanchez*, holding that government agents on roving patrol can stop and search automobiles without either probable cause or warrant. *United States* v. *Miranda*, 426 F.2d 283 (9th Cir. 1970).[3]

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[2] Mr. Justice Powell, in his concurring opinion, also noted:

> "* * * [I] join in the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports the search conducted in this case * * *." 413 U.S. at 275.

[3] We concede that a number of other opinions do contain some dicta from which the government might infer that this court would uphold a roving-patrol search so long as it was conducted within the 100-mile area defined in 8 C.F.R. § 287.1. *See, e.g., Duprez* v. *United States*, 435 F.2d 1276, 1277 (9th Cir. 1970); *Fumagalli* v. *United States*, 429 F.2d 1011, 1013 (9th Cir. 1970); *United States* v. *Elder*, 425 F.2d 1002, 1004 (9th Cir. 1970); *Barba-Reyes* v. *United States*, 387 F.2d 91 (9th Cir. 1967); *Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963); *Contreras* v. *United States*, 291 F.2d 63 (9th Cir. 1961). Nonetheless, *United States* v. *Miranda*, *supra*, is

All of our other pre-*Almeida-Sanchez* decisions upholding roving-patrol searches away from the border involved stops that were predicated upon: (a) probable cause to believe that the automobile stopped was carrying illegal aliens or contraband, *see, e.g., United States* v. *Ardle*, 435 F.2d 861 (9th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *cf. United States* v. *Kandlis*, 432 F.2d 132 (9th Cir. 1970); or (b) a reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time it entered the United States, *see, e.g., Alexander* v. *United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); or (c) a reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who has just crossed the border illegally. *See, e.g., United States* v. *Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). *See generally* Note, *In Search of the Border: Federal Customs and Immigration Officers*, 5 N.Y.U.J. Int'l L. & Politics 93 (1972). Moreover, our line of decisions, and that of the Court of Appeals for the Tenth Circuit (*see, e.g., Roa-Rodriguez* v. *United States*, 410 F.2d 1206 (10th Cir. 1969), permitting roving searches by the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court.

---

the only case which has been called to our attention in which this court held that a stop and search conducted by immigration agents on roving patrol was proper.

The government fares no better in its alternate claim that it was relying not only on prior judicial approval of roving searches but also upon the literal command of Congress and a regulation authorizing such searches. Section 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3), provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external border of the United States * * *." This section, enacted in 1952, revised in a manner not relevant here a statute enacted in 1946. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865. Soon after the 1952 revision, the Attorney General promulgated regulations, one of which defined "reasonable distance" as "within 100 air miles from any external boundary of the United States * * *." 8 C.F.R. § 287.1(a)(2).

This statute and regulation must, however, be read in light of the Fourth Amendment; and when so understood, they merely delegate authority to be exercised by border-patrol agents in accordance with constitutional limitations. Without the statutory authorization conferred by § 287(a)(3), border-patrol agents would not have legal power to search private vehicles for aliens under any circumstances. Under the statute, they are permitted to conduct certain warrantless searches. But, unless the search qualifies as a border search, the statute should not be read, as this court has read it, to dispense with the requirement of probable cause as well as the requirement of a warrant.

When the Supreme Court reversed us in *Almeida-Sanchez*, it did not declare the statute unconstitutional; it merely read the Fourth Amendment requirement of probable cause into the right of border-patrol agents to conduct warrantless searches which were not the functional equivalents of border searches. Other sections of the same act had earlier been subjected to similar judicial constructions to avoid conflicts with constitutional standards. *See United States* v. *Almeida-Sanchez*, 452 F.2d 459, 465-67 (9th Cir. 1971) (dissenting opinion of Browning, J.), *rev'd*, 413 U.S. 266 (1973). Judicial interpretation of a statute and departmental regulation to eliminate conflict with the Fourth Amendment hardly qualifies as the kind of "new" constitutional rule sufficient to deny an appellant the fruits of his appeal.

Peltier is not claiming the benefit of any decision overruling or enlarging "then-applicable constitutional norms," *Williams* v. *United States*, 401 U.S. at 654; rather, he seeks the application of principles enunciated by Chief Justice Taft in 1925 in *Carroll* and consistently adhered to by the Supreme Court thereafter. This is a case not so much of the retroactivity of *Almeida-Sanchez* as of the continued vitality of *Carroll* and its successors. The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez*, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.

A Supreme Court decision overruling state or circuit decisions does not necessarily mark a departure from prior decisions of the Supreme Court. *Robinson* v. *Neil*, 409 U.S. 505 (1973). The Supreme Court faced the question whether *Waller* v. *Florida*, 397 U.S. 387 (1970), which barred duplicate prosecutions when a single act violated both state and municipal laws, was fully retroactive. The Court concluded:

> "* * * [T]his Court had not earlier had occasion to squarely pass on the issue. But its decision in *Waller* cannot be said to have marked a departure from past decisions of this Court. Therefore, while *Waller*-type cases may involve a form of practical prejudice to the State over and above the refusal to permit the trial that the Constitution bars, the justifiability of the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases * * *.
>
> "We hold, therefore, that our decision in *Waller* v. *Florida* is to be accorded full retroactive effect * * *." *Robinson* v. *Neil*, 409 U.S. at 510-11.

The conclusion which we have reached here may or may not be consistent with the result in the other circuits that have before them the application of *Almeida-Sanchez* to searches conducted prior to June 21, 1973. The Fifth Circuit recently held that *Almeida-Sanchez* is not to be given retrospective effect. *United States* v. *Miller* (5th Cir., No. 73-1083, 1974).

The decision does not mention three other cases in which the circuit applied *Almedia-Sanchez* retroactively without discussion. *See United States* v. *Speed*, 489 F.2d 478 (5th Cir. 1973); *United States* v. *McKim*, 487 F.2d 305 (5th Cir. 1973); *United States* v. *Byrd*, 483 F.2d 1196 (5th Cir. 1973). The Tenth Circuit also has applied *Almeida-Sanchez* to pending cases in which the search occurred prior to the decision in *Almeida-Sanchez*. *See United States* v. *King*, 485 F.2d 353, 359 (10th Cir. 1973); *United States* v. *Maddox*, 485 F.2d 361, 363 (10th Cir. 1973).

The judgment of conviction is reversed, and the matter remanded to the district court with instructions to suppress the evidence seized in the search of Peltier's automobile.

Judges Chambers, Merrill, Browning, Duniway, Ely and Hufstedler concur in this majority opinion.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

The majority does not attempt to justify retroactively based upon the tests of *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *Stovall* v. *Denno*, 388 U.S. 293 (1967). Rather it asserts that before the question of retroactivity even becomes relevant, we must decide whether the Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), articulated a "new" constitutional rule. In order to be new, the majority contends, the constitutional rule must over-

rule "clear past precedent" or disrupt "a practice long accepted and widely relied upon." This threshold test comes from a footnote in Justice Stewart's dissent in *Milton* v. *Wainwright*, 407 U.S. 371, 381-82 n.2. (1972). As we noted in *United States* v. *Bowen*, —— F.2d ——, —— n.1 (9th Cir. 1974), it is unclear whether this abridged test should be applied in all cases. But even applying the test adopted by the majority, I disagree that the *Almeida-Sanchez* pronouncement is not new and, therefore, I believe the *Stovall* test is relevant.

The majority contends that the appropriate interpretation of the Supreme Court's holding in *Almeida-Sanchez* demonstrates that the rule is not new and dictates retroactivity. But the majority, falling into the same error as the majority did in Part I of *United States* v. *Bowen*, —— F.2d ——, —— (9th Cir. 1974) (Wallace, J. dissenting), fails to distinguish between where a majority of Justices has made a pronouncement and where it has not. Justice White, writing for himself and three other Justices, reviewed decisions of each of the courts of appeals having jurisdiction over districts bordering Mexico and concluded:

> [T]hose courts and judges best positioned to make intelligent and sensible assessments of the requirements of reasonableness in the context of controlling illegal entries into this country have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today.

413 U.S. at 298 (footnote omitted). Justice Powell, although concurring in the Opinion of the Court, agreed with Justice White's conclusion on this point:

> Roving automobile searches in border regions for aliens, likewise have been consistently approved by the judiciary. While the question is one of first impression in this Court, such searches uniformly have been sustained by the courts of appeals whose jurisdictions include those areas of the border between Mexico and the United States where the problem has been most severe.

413 U.S. at 278. The tenor of these statements, representing five of the nine Justices, seems more consistent with the conclusion that *Almeida-Sanchez* established a new constitutional rule.

I

Even ignoring that a majority of the Supreme Court may well believe that *Almeida-Sanchez* constitutes a new rule, the test adopted by the majority, when properly applied, also demonstrates that the rule of *Almeida-Sanchez* is new. Under the first alternative of the majority's test, a decision constitutes a new constitutional rule if it overrules "clear past precedent." It cannot be contended that to meet this alternative, the Supreme Court must reverse one of its prior decisions. On the contrary, as we held in *United States* v. *Bowen*, —— F.2d ——, —— (9th Cir. 1974): "The test does not require . . . that the

Supreme Court reverse itself in order for there to be an overruling of clear past precedent."

Prior to *Almeida-Sanchez*, the courts of appeals gave no indication that roving stops and searches were unconstitutional. *See, e.g., United States* v. *Miranda*, 426 F.2d 283 (9th Cir. 1970); *Roa-Rodriguez* v. *United States*, 410 F.2d 1206 (10th Cir. 1969). *See United States* v. *McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). The majority contends that this stream of judicial pronouncements is a mere aberration. However, these consistent holdings can hardly be said to a deviation from the law when 35 of 36 judges who have considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border have upheld immigration stops and searches. *Almeida-Sanchez* v. *United States*, 413 U.S. at 298-99 n.10 (White, J. dissenting). *Almeida-Sanchez* does overrule clear past precedent.

The majority's treatment of the statute pursuant to which the Border Patrol acted also deserves attention. Since 1952, searches for aliens within a reasonable distance from the border have been authorized by Congress. 8 U.S.C. § 1357(a)(3). Merely stating, as does the majority, that statutes have to be measured by the Constitution only begs the question. As we held in *United States* v. *Bowen*, —— F.2d ——:

> Although it is true that statutes have to be measured by the Constitution, a legally enacted statute becomes the law until it is vitiated by a court decision. Where the constitutionality of the statute has been repeatedly upheld by the lower courts, it becomes a clear precedent for law enforcement action. Prior statutory law should be treated no differently from prior case law.

The identical statute which we held to be clear past precedent in *Bowen* is involved in this case. There we held that in applying the first alternative of the threshold test, "[p]rior statutory law should be treated no differently from prior case law." *United States* v. *Bowen*, —— F.2d at ——. I, therefore, fail to see why *Almeida-Sanchez* does not overrule clear past precedent, both statutory and case law.

II

Under the second alternative of the majority's test, a decision constitutes a new constitutional rule if it "disrupts a practice long accepted and widely relied upon." Justice Stewart, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), formulated the second alternative in language that adds an additional dimension. He stated that a decision may constitute a new rule either by overruling past precedent (the first alternative of the majority's test) "or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." Under the *Chevron Oil* formulation of the test, *Almeida-Sanchez* clearly constitutes a new rule. First, the majority concedes that this issue has not previously been presented to the Supreme Court, making it by definition "an issue of first impression" before that Court.

Second, the resolution of an issue that would invalidate immigration stops and searches was not foreshadowed. As Justice White stated:

> . . . I cannot but uphold the judgment of Congress that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.
>
> This has also been the considered judgment of the three Courts of Appeals whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, although as sensitive to constitutional commands as we are, perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes.

Almeida-Sanchez v. *United States*, 413 U.S. at 294-95. Numerous appellate court cases have dealt with this issue and yet, the result prior to *Almeida-Sanchez* was consistently to uphold the stop and search. There simply was no foreshadowing of the *Almeida-Sanchez* rule.

However, even under the majority's formulation of the second alternative, *Almeida-Sanchez* still constitutes a new rule. The majority reaches an opposite conclusion by contending that there is only one prior decision in our circuit squarely upholding the roving

patrol search. The majority observes in a footnote that, in cases dating back to 1961, we have approved similar immigration searches —— F.2d at ——, n.3, but discounts all of those cases on the basis that any approving language is dicta. The majority, however, fails to explain why this classification should make a difference. The cases, whether or not the language is dicta, are important because they demonstrate a long accepted practice that has been widely relied upon. Apparently four Justices of the Supreme Court did not make such a distinction, for Justice White stated in reference to our circuit:

> [U]nder § 1357(a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant. *This has been the consistent view of that court.*

Almeida-Sanchez, 413 U.S. at 295 (White, J. dissenting) (emphasis added).

Not only has the Border Patrol been following a practice sanctioned by our prior cases, it has also been complying with 8 U.S.C. § 1357(a)(3) in making roving patrol stops. The statute explicitly authorizes immigration officials, within a reasonable distance of the border, to search vehicles without a warrant for illegal aliens. The statute in its present form was adopted in 1952. Since 1963, we have upheld the constitutionality of the statute. *Fernandez* v. *United States*, 321 F.2d 283 (9th Cir. 1963). A law enforcement practice, authorized for over a dec-

ade, adequately meets the second requirement of the majority's threshold test.

III

If either alternative of the majority's threshold test is met, *Almeida-Sanchez* states a new rule. Here, both alternatives are met and, therefore, retroactively should be judged by the *Stovall* test. Applying that test and for reasons similar to those stated in Part II of *United States* v. *Bowen*, —— F.2d at ——, I would hold that the retroactivity test would require prospective application in this case.[1] As the Court stated in *Linkletter* v. *Walker*, 381 U.S. at 637:

[1] The majority's disclaimer in footnote 1, reserving the question of the application of *Almeida-Sanchez* to collateral attacks upon prior convictions, does not minimize the potential havoc the majority's ruling could have on the administration of justice. Because of its retroactivity stance, any distinction between a defendant with a case on appeal at the time of the *Almeida-Sanchez* decision and the countless others whose convictions were final prior to that time would be artificial at best. It appears to me that if the Court in *Almeida-Sanchez* did not enunciate a new rule, all convictions based upon evidence obtained during a roving patrol search without warrant or probable cause must be reversed, regardless of whether they are now final or on direct review. This conclusion is supported by the Court's statement in Stovall v. Denno, 388 U.S. 293, 300 (1967):

> We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review.

As Justice White said in Williams v. United States, 401 U.S. 646, 656 (1971):

[Footnote continued on page 19a]

> In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Judges Koelsch, Wright, Trask, Choy and Sneed concur in this dissenting opinion.

[1] [Continued]

> [I]t should be clear that we find no constitutional difference between the applicability of *Chimel* to those prior convictions that are here on direct appeal and those involving collateral proceedings.

Three other Justices joined in Justice White's opinion and Justice Marshall's dissent can be considered to be in harmony with the language quoted to the extent that he would apply the *Stovall* test in cases that are before the Court on collateral attack.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2509
DC #14780

UNITED STATES OF AMERICA, APPELLEE

vs.

JAMES ROBERT PELTIER, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded to the District Court

with instructions to suppress the evidence seized in the search of Peltier's automobile.

[SEAL]

A TRUE COPY
ATTEST 6/20/74

EMIL E. MELFI, JR.
Chief Deputy and Acting Clerk

By /s/ Ray Hewitt
RAY HEWITT
Senior Deputy

Filed and entered May 9, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552643 1

Supreme Court, U. S.
FILED
DEC 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,
Petitioner

—v.—

JAMES ROBERT PELTIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 8, 1974
CERTIORARI GRANTED NOVEMBER 11, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,

Petitioner

—v.—

JAMES ROBERT PELTIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[The opinion and judgment of the court of appeals are appended to the petition for a writ of certiorari.]

DOCKET ENTRIES

DATE	PROCEEDINGS
3- 7-73	Ent. ord. and fld. Ind. JS 2. Bond fixed at $10,000 (PS) (CASH) + $1,000 cash.
	Fld. $10,000 P/S + $1,000 cash bond posted 2-28-73.
3- 9-73	Deft. arr. T/N & plea NG. Ent. ord. set for O.H. for 3-20-73 @ 10 am; ord. assigned to JUDGE SCHWARTZ. (HARRIS).
	Filed Magistrates Transcript.
3-20-73	O.H.—Fld. O. form. Ent. ord. set for 3-26-73 @ 9 am for mots. & jury trial settg. (McCUE)
3-26-73	Ent. ord. hrg. on mots. cont. to 4-9-73 @ 2 pm & for jury trial seetg. (S)
4- 5-73	Fld. not. of mot. for 4-16-73 @ 2 pm & mot. to suppress evid.; fld. P/A in suppt. of mot.; fld. affid. of Sandor W. Shapery in suppt. of mot.
	Fld. stip. w/ord. thereon to cont. hrg. mots. from 4-9-73 to 4-16-73 @ 2. (S)
4- 9-73	Fld. waiver of deft's presence t/w declaration of service by mail.
	Fld. dec. of ser. by mail w/not. of mot. to suppress evidence t/w aff. in support of mot. t/w P/A not for April 16, 1973 @ 2:00 p.m.
4-12-73	Fld. opp. to mot. to suppress t/w P/A.
	HRG. MOTS.—Swore wits., fld. exh. Ent. ord. hrg. mot. to suppress evid. denied; ord. trans. back to Judge Schwartz for jury trial settg. (GT)
	HRG. MOTS.—Ent. ord. mot. to suppress transferred to Judge Thompson; ord. case set for jury trial for 5-17-73 @ 9:30 am. (S)
5-17-73	Fld. waiver of trial by jury & of special findings of fact.

DATE	PROCEEDINGS
	Fld. stip. re facts.
	COURT TRIAL—Ent. ord. CT finds deft. G; trial submitted on stipulated facts & trans. of mot. to suppress; ord. ref. to P/O for I/R and cont. to 6-25-73 @ 9 am, for sent. (S) Fld. trans. of 4-16-73. (FRANDLE)
6-25-73	Ent. ord. comm. to cust. AG for 1 yr. & 1 day impr. under 18:4208(a)(2); ord. special parole 2 yrs.; ord. present bond to be exon. upon posting appeal bond in amt. of $10,000 P/S + $1,000 cash deposit. (S) JS-3.
	Fld. judgmt. iss. cys. (Ent. 6-25-73)
7- 3-73	Fld. NOTICE OFAPPEAL; designation of record on appeal.
7-10-73	Fld. not. of petn. for 7-30-73 @ 2 pm; fld. petn. for exon. of bail & P/A in suppt. thereof; fld. affid. of cnsl. t/w affid. of serv. by mail.
7-11-73	Fld. $10,000 bail bond on appeal + $1,000 cash bond posted 7-11-73 w/ord. thereon. (S) Issd. abstract of order to mars.
7-11-73	Fld. Order granting Appellant forma Pauperis standing.
7-30-73	HRG. MOTS.—Ent. ord. new bond on appeal shall be fld. $10,000 P/S & upon flg. said bond the old bond shall be exon. (S)
8- 1-73	Fld. ord. modif. appeal bond that deft be admitted to $10,000 bail, pending appeal with no cash deposit or other security required to be deposited with CT. (S)
	Fld. $10,000 bail bond on appeal posted 8-1-73. (S)
8- 3-73	Fld. orig. & 2 cys. of reptr's. trans. on appeal of 5-17-73 & 6-25-73. (RIPLEY)

DATE	PROCEEDINGS
8- 3-73	Mld. Clerk's Record t/w Reporter's Transcript to USCA.
8- 3-73	Fld. disb. ord. and drew ck. $1,000.00 payable James Peltier, refund cash bond on appeal. (S)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1972 Grand Jury

No. 14780 Criminal

[Filed Mar. 7, 1973, Clerk, U.S. District Court, Southern District of California. By Jo Larson, Deputy]

UNITED STATES OF AMERICA, PLAINTIFF
v.

JAMES ROBERT PELTIER, DEFENDANT

INDICTMENT

Title 21, U.S.C., Sec. 841(a)(1)—Possession of a Controlled Substance with Intent to Distribute

The Grand Jury charges:

COUNT ONE

On or about February 28, 1973, in the Southern District of California, defendant JAMES ROBERT PELTIER did knowingly and intentionally possess, with intent to distribute, approximately 270 pounds of marihuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ Leo H. Johnson
Foreman

/s/ Harry D. Steward—[initialed RWB]
HARRY D. STEWART
United States Attorney

RELS:ees (3-6-73)

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS EVIDENCE

[4] SAN DIEGO, CALIFORNIA:

APRIL 16, 1973: MORNING SESSION

THE CLERK: Case No. 14780; United States of America versus James Robert Peltier; for Hearing Motions.

MR. SHAPERY: Sandor Shapery, Your Honor, for the Defendant.

THE COURT: All right.

MR. COFFIN: Thomas Coffin for the Government, Your Honor.

There was no Search Warrant in this case; we are ready to proceed.

THE COURT: All right. You may proceed with your evidence.

MR. COFFIN: May I have one minute. The Government would call Charles Ainscoe, Your Honor.

THE COURT: All right.

MR. SHAPERY: Your Honor, may I request that the other Agent present be excluded from the courtroom during this testimony?

MR. COFFIN: That would be Mr. Pfiester, Your Honor; I have no objection.

[5] CHARLES AINSCOE,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE CLERK: Take the stand, state your full name and spell your last name for the record.

THE WITNESS: Charles Ainscoe, A-i-n-s-c-o-e.

DIRECT EXAMINATION

BY MR. COFFIN:

Q Mr. Ainscoe, what is your occupation?
A I'm a Border Patrol Agent.
Q How long have you been employed as a Border Patrol Agent?
A About four years.
Q Prior to becoming employed as a Border Patrol Agent, what was your occupation?
A I was in the Marine Corps.
Q For how long, sir.
A Twenty-three years.
Q What rank did you have at the time you left the Marine Corps?
A First Sergeant.
Q Now, drawing your attention to February 28th of this year in the early morning hours of that date, where [6] were you stationed in connection with your duties as a Border Patrol Agent?
A My official station is Temecula, California; I was on Highway 395 near Temecula observing traffic.
Q Was that in a Border Patrol vehicle?
A That was in a Border Patrol Redlight Sedan.
Q And was anyone with you at that time?
A My partner, Bill Pfiester.
Q And at the point that you were observing traffic, sir, approximately how far is that from the Mexican-American Border?
A About seventy air miles, I believe.
Q Now, at about what time was it that you were observing traffic on the 28th of February?
A About 2:30, maybe a little before that, I believe.
Q And could you describe the traffic conditions at that hour for the Court?
A They were light, light traffic.
Q Did you have occasion, on that date, to see the Defendant, Mr. Peltier?
A Yes, I did.
Q What was he doing when you first saw him?

A We observed Mr. Peltier drive by, through our headlights, in his car, northbound on Highway 395.
[7] Q Now, there is a stationary checkpoint in the Temecula area, is there not?
A From time to time, yes.
Q Was that stationary checkpoint—was that operating on the 28th of February?
A No, it was not.
Q And was Mr. Peltier, at the time you saw him, or at the place that you saw him, would he have been north of that checkpoint?
A Yes, he would have been north of where the checkpoint normally is.
Q Now, what did you do after you saw Mr.—
THE COURT: Just a minute. How far north?
THE WITNESS: It would be about a mile and a half, Your Honor.
THE COURT: North of the checkpoint?
THE WITNESS: Yes, sir.
THE COURT: How far is that from the Border?
THE WITNESS: The checkpoint is about seventy miles from the Border, sir, air miles.
THE COURT: All right. Go ahead.

BY MR. COFFIN:

Q What did you do after you saw Mr. Peltier drive by?
A We pursued his vehicle and made a stop.
[8] Q What was your purpose in stopping him at that time?
A We were going to perform a routine immigration inspection to search for illegal aliens.
Q After you stopped Mr. Peltier, did you notice what type of license plates were on the vehicle he was driving?
A As he was stopping, we noticed that he had out-of-state license plates, Iowa, I believe it was.
Q And Mr. Peltier, was he alone in the car?
A Yes, he was.
Q What happened, then, after you stopped Mr. Peltier?
A I walked up to the door of Mr. Peltier's car, while my partner stayed back by the passenger door of the Patrol sedan. I told Mr. Peltier that it was a routine

immigration inspection and I asked him to look in his trunk.

Q Now, was that route that Mr. Peltier was traveling upon, was that known to you from previous occasions, as being a route used by alien smugglers?

A Yes, it was.

Q Would you say it was frequently used by alien smugglers?

A We have about nine hundred operations at [9] this point in the month at that station, and I would say the majority of them come from that highway.

Q What was your purpose in asking Mr. Peltier to open his trunk?

A We were going to search for illegal aliens.

Q All right. Now, what happened after you asked Mr. Peltier to open the trunk?

A He got out of the car; on the way back to the trunk, I asked him where he was coming from. He replied, I believe, San Diego. I asked him where he was going; he said, Las Vegas. He put the key in the trunk and I noticed there was a tag on it, and I asked him if it was his car; he said it was.

Q By a "tag," what do you mean when you said you notice a "tag" on it when he put the key in the trunk?

A It appeared to have some writing on it. I couldn't describe it exactly right now, but it was the type that is used on loaner vehicles or rental vehicles sometimes.

Q What year model was this car, do you recall?

A I don't recall.

Q Do you recall approximately how old the car was?

A It was in the sixties, early sixties, I think.

[10] Q Now, what did you do, then, after you noticed this—what happened?

A Then he opened the trunk, and I looked in the trunk and there were a number of suitcases and several plastic bags in the trunk.

Q By "plastic bags," would you describe those?

A The type of bag that is used as an insert for a garbage container.

MR. COFFIN: May I have a moment, Your Honor.

THE COURT: Yes.

MR. COFFIN: May the witness step down?

THE COURT: Yes. Go ahead, step down.

BY MR. COFFIN:

Q Agent Ainscoe, showing you—

MR. COFFIN: Can I mark these Government Exhibits 1 through 6?

THE COURT: They may be so marked.

(Government's Exhibits Nos. 1 through 6 were marked for identification.)

BY MR. COFFIN:

Q Showing you what has been marked as Government's Exhibit 1 for identification, a large red suitcase, can you identify that exhibit?

A I can't remember exactly whether these are the exact bags, but I think they were; there were several [11] suitcases and two or three bags.

Q Do you recall approximately how many suitcases there were?

A I didn't count them, but there were four or five.

Q Now, showing you—taking a plastic bag from Exhibit 1, can you identify this, sir?

A That is the type of bag that the marijuana was in, the bags at the time of the arrest were outside of the suitcases, and they were full of marijuana kilos, and they were pretty easily seen, they weren't symmetrical, the edges were sticking out every which way.

Q At any rate, the Defendant had three bags similar to what I am holding up now, in the trunk of his vehicle at the time the trunk was opened?

A I didn't count the bags. I remember there was three after we got back to the office, but there was definitely one in there.

Q After observing these plastic bags and suitcases in the trunk, did you notice anything else about the plastic bags at that time?

A Just as I said, they looked like kilo bricks of marijuana inside them.

Q What led you to conclude that?

A I have seen it before.
[12] Q Have you seen kilo bricks of marijuana before?
A Yes, I have.
Q On approximately how many occasions?
A On, I'm sorry to say, twenty, thirty times, different occasions.
Q Have you seen—and these are bricks that are shaped in a rectangular fashion; is that correct, kilo size?
A Right.
Q Have you seen kilo bricks of marijuana, prior to February 28th of this year, contained in plastic garbage bags before?
A Yes, I have.
Q Is it your testimony, on the 28th when the trunk was opened, that you saw some rectangular impressions inside the garbage bags at that time?
A That's right.
Q All right.
A I think—you can see the bags themselves; I think you can see a little bit through them, they are not completely opaque.
Q Did these rectangular impressions you saw on the garbage bags on February 28, were they similar or dissimilar to the marijuana bricks that you had seen on [13] previous occasions?
A They are similar.
Q After you made these observations, sir, what did you do next?
A As soon as I saw the bags with the kilo bricks, I turned around and I spoke to my partner and I said:
"Bill, I think we have got some weed here."
I asked Mr. Peltier to turn around and face away from me. My partner approached the Defendant and I went into the trunk with the intent to see what was in the bag. I smelled some marijuana and I tore open the bag.
Q Did you make this statement to your partner:
"I think we have some weed here,"
before or after you smelled marijuana?
A This was before I smelled marijuana.

Q And then what did you do?
A Well, after I made the statement, I asked Mr. Peltier to turn around, as I remember it, and, then, I went back into the trunk, put my head in the trunk, and this plastic bag was pretty far up in the back of the trunk, and I reached in there and I tore open the bag and I confirmed that they looked like bricks of marijuana.
Q Now, did you smell the marijuana prior to opening the bag?
A Yes.
[14] Q But after you made the statement:
"I think we have some weed?"
A Yes, that's right.
MR. COFFIN: May I approach the witness, Your Honor?
THE COURT: Yes.

BY MR. COFFIN:

Q Removing a kilo package from what has been marked as Government's Exhibit 1, can you identify that package for the Court, please?
A I have my initials on it and the date; this is the package I took from there.
Q You took from the trunk of Mr. Peltier's car?
A That's right.
Q Approximately how many packages of marijuana were there, do you recall?
A I don't remember, it is over a hundred; I can't remember exactly.
Q And were all the packages wrapped in this fashion?
A I believe there was two colors of paper, I'm not sure: I think some of them were brown, but they were all wrapped in that kind of butcher paper, I believe.
Q All right. And, specifically, drawing your [15] attention to these holes, which appear from this brick package that I have just shown you, sir, were those holes there, do you recall, at the time that you seized the marijuana?
A I don't remember.
Q At any rate, you, yourself, did not punch any holes in it?

A No, I did not.
Q What happened after you opened the bag and saw the marijuana?
A I placed Mr. Peltier under arrest; I patted him down and I read him his rights, and we went back to the office.
MR. COFFIN: I have no further questions.
THE COURT: Cross-examination?
MR. SHAPERY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SHAPERY:

Q The night of the 28th when you stopped this vehicle, about how many vehicles had you stopped that night?
A I think we had been pretty active; I can't really remember. I think we had stopped several.
Q Several that night?
[16] A It is hard to say, sir, you know, it has happened quite awhile ago. Some nights we run them down quite a few and other nights, we don't get quite as many.
Q About what percentage of the cars would you say you stopped versus the ones that go by.
MR. COFFIN: I will object, Your Honor; it is irrelevant.
THE COURT: Sustained.

BY MR. SHAPERY:

Q Was Mr. Peltier's car just picked at random?
A No; Mr. Peltier looked to me like a Mexican when he went by, and I chased him down for that reason; I thought he was a Mexican man.
Q You were parked with your lights shining across 395?
A That's right; I was parked on the center median.
Q This was at 2:30 in the morning, approximately?
A About; yes, about 2:30, something like that.
Q Do you recall approximately what rate of speed Mr. Peltier was traveling?
A No, I don't. He was going along just like the rest of them.

Q Is there any other reason why you stopped this particular car?
[17] A No.
Q You were not informed ahead of time, possibly?
A Absolutely not.
Q Do you recall the weather conditions that night?
A I think we had been having some rain; I don't know whether it was raining at the time, I think it had quit raining at the time.
Q At the time you stopped Mr. Peltier, did you observe any suitcases in the back seat?
A No, I didn't; he had some clothes in the back seat. I just—I took a quick look in the car when I went up and I saw it wasn't a load of aliens, so I just asked him to step back and open his trunk.
Q Now, when you asked him to open the trunk, the purpose was looking for illegal aliens?
A Absolutely.
Q At the time that you asked Mr. Peltier to open his trunk, where was your partner standing; do you recall?
A He was back by the passenger door of the Redlight sedan.
Q Was your vehicle parked behind Mr. Peltier's vehicle?
[18] A Yes, it was.
Q Did you have a flashlight?
A Yes, I did.
Q Were you using a flashlight?
A I suppose I was, I'm not sure; I probably did to look into the car.
Q When you opened the trunk, did you observe the position of the suitcases in relationship to the trash bags?
A I just remember that there were a lot of suitcases in there, and that the one trash bag that I looked into was sitting up near the back, the farthest away from the door, the edge of the door, and I think there was all three of the trash bags out there, but I couldn't swear; there was more than one of them, I'm pretty sure.

Q Now, you previously testified that you had prior experience of marijuana being smuggled in trash bags—

A That's right.

Q —and is that true—that led you to believe there was marijuana in these trash bags?

A Well, I think the main thing is, I saw the kilo bricks sticking out through them, you know, and it just looked like marijuana to me.

[19] Q Were there any holes in the trash bags, or was just the impression sticking out?

A I didn't see any holes; I can't really say. When I first looked at it, all I saw was the trash bag with the kilo bricks, the edges of the kilo bricks sticking out there. Like I said, you can almost see through that thing.

Q Are you aware of the fact there are six trash bags here?

A No, I wasn't.

Q Would you possibly recall that the trash bags were doubled; in other words, there was one inside of another one with the kilos inside of that?

A Well, I will tell you why I don't remember some of this stuff, is because after I got back to the office with Mr. Peltier in the sedan, I took him inside the office and I remained inside the office with Mr. Peltier for most of the remainder of the evening, until the Customs Agents arrived, and my partner was the one, with the aid of another Officer, who removed the marijuana from the vehicle, made the count, and later I went out. I made a count on the stuff with the Customs Agent and made my initials on several of the packages.

Q Would you be surprised to learn that the bags were doubled?

[20] MR. COFFIN: I object.

THE COURT: Sustained. I think you can ask him, Counsel, whether he remembers it or not and if he doesn't remember it, he doesn't remember it.

BY MR. SHAPERY:

Q Is is possible that the trash bags could have been doubled?

A Sure, possible.

MR. COFFIN: I will stipulate, Your Honor, that they were doubled.

THE COURT: All right.

MR. SHAPERY: Thank You.

BY MR. SHAPERY:

Q Now, at the time that you stuck your head into the vehicle's trunk and claimed that you smelled the marijuana, and at this point, you were fairly certain that there was marijuana in these trash bags and that is basically what you were looking for; is that right?

A That is exactly right.

Q And, then, you, at this point, put your head in the trunk and took a deep breath and smelled marijuana?

A I smelled the odor of marijuana as I was reaching in the trunk there.

Q Do you smoke?

A Yes, I do.

[21] Q Had you been smoking that night, do you recall?

A Probably, I can't say for sure.

Q The area where this car was pulled over, could you tell me what the terrain was like; was it a residential area or open fields?

A It was—I guess you would call it open fields; it wasn't—there was no houses or sidewalks near by.

Q You say it had been raining that night?

A I believe it had, yes.

MR. SHAPERY: I have no further questions, Your Honor.

THE COURT: All right. Anything further, Mr. Coffin?

MR. COFFIN: Just one, Your Honor, I forgot to bring this out on direct, if I may.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. COFFIN:

Q Prior to February 28th of this year, approximately how many occasions had you smelled the odor of marijuana?

A Just dozens; I can't really give you a [22] number, but dozens of times.

MR. COFFIN: I have nothing further.

THE COURT: All right. Would you step over here to the board, please, and show me where you were and what streets were coming into where you were and so forth; where you location first was and where you finally stopped the Defendant.

THE WITNESS: Okay.

THE COURT: Put North at the top.

THE WITNESS: This is Highway 395, northbound lane, southbound lane, center median; this is the Interstate Section called Rancho California Road; we were parked right here with out lights shining in this direction. Mr. Peltier went by northbound; we gave pursuit; we stopped him up, possibly, a half a mile or a little bit farther up north. There is one other street that comes in—

THE COURT: Winchester Road, isn't it?

THE WITNESS: From one side here, this is named Jefferson Street; it is somewhere between these two streets, I think.

THE COURT: South or north of Winchester?

THE WITNESS: Definitely south of Winchester, which is farther up.

THE COURT: All you could see—what could you see as he proceeded past you northbound?

[23] THE WITNESS: We saw an old car with what I thought was a Mexican driver, and this is a good bet for a load of aliens.

THE COURT: Did you see any of that material that was in the back; could you see any of the material in the back?

THE WITNESS: No, sir, we couldn't it went on by about fifty, sixty miles an hour.

THE COURT: All right. Anything further, gentlemen?

MR. COFFIN: Not on behalf of the Government.

MR. SHAPERY: May I ask some more questions, Your Honor?

THE COURT: Certainly; go ahead.

RECROSS EXAMINATION

BY MR. SHAPERY:

Q At the time you saw these bags, did you ask Mr. Peltier what they contained?

A No, I don't believe I did.

MR. SHAPERY: No further questions.

THE COURT: One other question. You said—I still don't understand—I take it there were none of these bags actually broken; you couldn't actually see the kilos?

[24] THE WITNESS: Let me show you, Your Honor, I think I could see it; I didn't remember myself until I saw it in Court today. You see there?

MR. SHAPERY: Excuse me, Your Honor, it was stipulated the bags were doubled, so if we could get it through two bags—

THE WITNESS: Yes; okay. Well, I guess I couldn't, but I saw all kinds of irregular shapes in kilo sizes like that, Your Honor.

THE COURT: Were the bags stuffed full?

THE WITNESS: They were pretty full, right.

THE COURT: And they were not stacked in any symmetrical order?

THE WITNESS: No, not symmetrical; the way they were set in there, the kilos were just like that, sticking out all over there.

THE COURT: All right. Anything further?

MR. COFFIN: No, your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Call you next witness.

MR. COFFIN: The Government would call Mr. Pfiester to the stand.

[25] WILLIAM PFIESTER,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE CLERK: Take the stand, state your full name and spell your last name for the record.
THE WITNESS: William Pfiester, P-f-i-e-s-t-e-r-.

DIRECT EXAMINATION

BY MR. COFFIN:

Q What is your occupation?
A Border Patrol Agent at Temecula.
Q How long have you been employed as a Border Patrol Agent?
A Approximately nineteen and a half years.
Q Drawing your attention to February 28th, 1973 in the early morning hours, did you have occasion to see the Defendant, Mr. Peltier, on that date?
A Yes, I did.
Q And were you with another Border Patrol Agent at that time?
A Agent Ainscoe.
Q Did you observe—after the stop of Mr. Peltier was made, did you observe Mr. Peltier when he opened the trunk of his vehicle?
[26] A Yes, I did.
Q What did you observe, if anything, Mr. Ainscoe do at that time?
A He asked Mr. Peltier what was in the suitcases and I couldn't hear his answer, I was too far away, and I saw him patting a couple of garbage bags with his hand, and a few seconds later, he said to me:
"I think we have some weed here."
Q What happened at that time?
A I moved up and watched Mr. Peltier to make sure he was no danger to my partner while my partner investigated further.
Q Did he then open the bags?
A I don't know if he opened it or punched a hole in it with his finger, I couldn't tell you.
Q But prior to opening the bags, he stated to you: "I think we have some weed here."
A That's correct.
MR. COFFIN: Thank you. I have no further questions.

THE COURT: All right. Cross-examination?
MR. SHAPERY: Yes, Your Honor.

[27] CROSS-EXAMINATION

BY MR. SHAPERY:

Q Did you just state that your partner was observed patting the bags with his hand?
A He felt of them, yes.
Q Was this prior to the statement that he said: "I think we have some weed here?"
A That's correct, sir.
MR. SHAPERY: I have no further questions.
THE COURT: Anything further, gentlemen?
MR. COFFIN: No, Your Honor.
THE COURT: You may step down.

(Witness excused.)

MR. COFFIN: Your Honor, if we may stipulate that these kilos contained in Government's Exhibit 1 are, in fact, kilo bricks of marijuana and that they are from the vehicle driven by Mr. Peltier on the date in question, and that they are from the vehicle driven by Mr. Peltier on the date in question, and that they are in the same condition as they were in on that date—
The Government will rest at this time.
MR. SHAPERY: So stipulated.
THE COURT: Anything for the Defense?
MR. SHAPERY: Yes, Your Honor.
What we have here is a situation where it is our [28] contention that probable cause was not justified, it was not established. Basically, what is being relied on by the Government is:

1) An out-of-state car was stopped;
2) Suitcases were found in the trunk; there was another suitcase in the back seat and some plastic bags in the trunk;
3) That there were irregular shapes sticking out of the plastic bags which, from my observations, could have been anything from a box of dog food to books or something like that;
4) The fourth point which is being relied upon is the fact that there was a tag on the key to the car;

5) The fifth point, as has been testified to, is one of the Agents stuck his head into the trunk, patted a bag, and claimed, at that point, that he had marijuana.

Now, taking each one of these points, I don't think it is uncommon to see an out-of-state car, particularly with suitcases in it. I think if there were any probability of any evidence leading to a carload of marijuana, it would probably be a car with a California license plate, rather than out-of-state. I think it is a common thing to see out-of-state cars with suitcases.

[29] Additionally, using trash bags; I personally have, on many occasions, especially on trips, taken and loaded up things in trash bags; such things as I didn't want in my suitcase, toiletries, thing like that that could spill out. I don't see anything uncommon with that.

Another point relied upon, is the fact that there was a tag on the key to the car. Now, I personnally have had my own car worked on a number of occasions and every time I take it in the shop, they put a tag on it and write down a license number. I think that doesn't lead to any greater inference that the car is borrowed, leased, stolen or anything else. I don't seee that the inferences are there.

If we reconstruct this, we start with:

1) A car with an out-of-state license plate;
2) Suitcases and plastic bags in a trunk;
3) The patting of the suitcases—the patting of the plastic bags.

At this point, it has been stated there was no longer a search for illegal aliens. There was no belief that they could be in the trash—in the plastic trash bags or in the suitcases; it is obvious they were not large enough.

At that point when he patted the bag, he was relying on:

[30] 1) Out-of-state-license;
2) A tag on a car key;
3) Previous observation that trash bags carry marijuana.

I think most trash bags are more often then not carrying things other than marijuana, especially one being

found in cars. I don't think that that establishes probable cause. In fact, I'm confident that it doesn't as a matter of law.

Now, the patting of the bag, at this point, was not a search for an illegal alien; at that point, feeling the bag would be a violation of Mr. Peltier's Constitutional Rights under the Fourth Amendment, to an illegal Search and Seizure.

Beyond this point, though, not only did he do this in violating his rights, he put his head into the trunk. He was no longer looking for illegal aliens; this was going beyond the scope, as all the cases have proved, going beyond the scope of a search for aliens, and on that basis, he must have probable cause and it was not present.

And on that basis, we feel that Mr. Peltier's Constitutional Rights have been violated, and that there is not probable cause to search a vehicle, as far as patting the bags or sticking his nose in there and smelling. On this basis, we feel there has been an illegal Search and [31] Seizure.

However, there is one last point I would like to make, that is, if we could possibly, in regard to saving the Government time and money, if we could stay any further proceedings pending the outcome of the *Almeida-Sanchez Case*, which is before the Supreme Court. It has already been argued and we are awaiting a decision any day to test the Constitutionality of the alien stop itself, and on that basis, I think maybe we could—if we could just have a stay of any further proceedings pending the outcome of that case, it might save the Court and the State some time and money.

THE COURT: All right. What do you have to say, Mr. Coffin?

MR. COFFIN: Well, first of all, Your Honor, stop, of course, comes under *Almeida-Sanchez*, and under the law, as it now stands, it is a valid stop; an Agent opening up the trunk of the vehicle, perfectly valid as an immigration check, and I think once he saw the garbage bags with kilo impressions coming out from them, that he could see the impressions of what he associated with

kilo bricks of marijuana, he had probable cause at that time to open the bags.

When you go further with that, and when you go to the actual smell of the marijuana, he definitely had [32] probable cause, but I think with just the visual observations of kilo impressions in garbage bags—you can sit here and take each point and explain it away, but we are not dealing with "beyond all doubt;" we are dealing with probable cause, and probable cause means just that.

What is probable under the circumstances? Is it probable that this is a man who says he is going to Las Vegas? Is it probable that he is transporting old cigar boxes in these three huge garbage bags, or is it more probable that he was transporting, what Agent Ainscoe had seen on previous occasions being transported in garbage bags, that is marijuana, and I think it is absurd to argue that a man of his experience would come to any different conclusion, but that the bags had, in fact, marijuana in them. And I think that, at that time, he had probable cause to open the bags.

He didn't open them at that time; apparently, he felt them and he also smelled marijuana. For the life of me, I can't conceive feeling a bag to be an Unconstitutional search.

I know of one case, decided by the Ninth Circuit, that said that:

"An Agent, rather than opening a footlocker, should have moved it to determine what, if anything, was inside of it before he opened it."

[33] That was a recent Ninth Circuit Case; I believe it was Judge Hoffstetler and Ely, where the Agent testified that he saw a rectangular footlocker and he thought they were connected and he opened them up to see if an alien was there. They said, rather than opening the footlocker—there turned out to be two separate footlockers —he should have taken the footlockers and see if they could be separated.

I think what is sauce for the goose, is sauce for the gander, and under that theory, certainly, Agent Ainscoe violated no one's rights in feeling the bag, especially, after he had reasonably concluded that there was, in fact, kilo bricks of marijuana in those bags.

Does Your Honor have any questions?

THE COURT: No.

MR. SHAPERY: Your Honor, if I may be heard on that point?

THE COURT: Go ahead.

MR. SHAPERY: I believe that the Government is trying to associate the moving of the footlocker, where there was a search for illegal aliens versus the feeling of the bag where there is belief that there is marijuana contained therein, they are two entirely different things.

Now, if Agent Ainscoe had felt the bag to see if there was an alien in there, I would say, fine, we do not [34] have an illegal Search and Seizure. However, it has been stated and it is a matter of record, now, that he was in search for marijuana and had the belief that there was marijuana. On that basis, he did not have authority to proceed any farther. If he had a reasonable belief that there was marijuana in the car, he could have had the car towed to a station or held there and gotten a Search Warrant or whatever, but it was a violation of my client's Fourth Amendment Constitutional Rights, in that, there was no probable cause to feel the bag.

Now, the question comes down to this, Your Honor, is it more likely than not that a car with a trash bag in it is going to contain marijuana. I don't think so. I don't think that most cars that have trash bags in them are going to contain marijuana, or would lead a person to believe that a car with a trash bag in it is going to have marijuana. I don't see that that even comes close to reasonable belief, more likely than not, or whatever terms you wish to use, that there was contraband in that car and that there was a crime being committed.

THE COURT: In listening to Mr. Ainscoe, I think that at the time that he stopped the automobile in the early morning hours on 395, that there is little or no doubt that, in his mind, he was looking for aliens.

He said the Defendant appeared to him to be [35] Mexican, and while, apparently he is of French extraction based upon his name, he does look to be dark-skinned and at night, that could easily be the case, that he would appear to be of Mexican descent.

After he stops the car, he asked for the key to the trunk and the Defendant opens the trunk with the key with the tag on it. I don't know that that is, in itself, of any great moment, but it is to suspicious Border Patrol Agents, a significant factor.

I would imagine that the out-of-state plates, at this point, with the tag on the key, became a factor. I would even say that was a significant factor, but when you put the two together, you might have a factor, and, then, he observes in the trunk, these brick impressions protruding from the garbage bags, which he associates and which he feels resemble kilo forms or kilo brick forms of marijuana, which he says he has observed on prior occasions in plastic bags, or plastic garbage-type bags.

Now, his testimony was that at the time he had formed in his mind an opinion that there was marijuana in those plastic bags, that as he went forward, I suppose you could say to verify that opinion, to inspect those plastic bags; he smelled the odor of marijuana after he had announced his statement that he thought there was marijuana in the car. We have "weed" here or whatever he [36] said, that he smelled the odor of marijuana before he touched the bags, not after. He couldn't have touched the bags until his head went into the car—until his head went—because he says they were way up in the back. That is his testimony.

Now, the next Officer said that—if I recall, that he touched the bag first, and then he said he thought that he had weed there, but one way or the other, if he smelled it, he smelled it right at the time of or, certainly, shortly before he touched the bags, because, according to his testimony, the bags were way up in the back, but that doesn't even concern me as much, because I think that the odd-shaped brick-type packages protruding through the plastic bags were the—and we have to look at the people that are—upon which probable cause is based. This is a Border Patrolman who has been in the business for four years now. He said he had seen these kilo bricks of marijuana on many, many occasions.

What is reasonable, probable cause? It is what this Court, I presume, terms to be what the Circuit Court

may not agree with. I don't know, but if we view it in the light of the Officer, his experience in his job, in the job that he is doing, and what he has seen in the past, I think we have to say that, even before he smelled the marijuana, when he saw these protruding objects which, [37] to him, resembled brick-shaped objects of marijuana, that they were not uniformly or symmetrically in the packages so they were protruding—there is no evidence to the contrary in that regard, that he had reasonable and probable cause to go further. He is not obligated to close his eyes if he is looking for aliens and he sees a machine gun laying on the back seat or—he is not obligated to close his eyes—Close the trunk and say: "I didn't see it."

Let's take something more closely akin or analogous to it. If he saw ballons in cylindrical shape or some condoms in cylindrical shape laying on the floor of the car, I think—I don't know about him, but I know I would certainly think that there might be some contraband in those ballons, heroin or cocaine or something of that nature.

I think that what he sees, we have to determine reasonable and probable cause by the Officer's good faith intentions, based upon what he sees and Mr. Ainscoe impresses me as one who states what he sees, was sure of what he saw. When he wasn't sure of something, he said it; like the number of suitcases in the back of the car, he said he didn't know. He said he didn't know what the car looked like, didn't remember. What he does remember, I think he articulated and I think there was [38] reasonable and probable cause to go further.

So, the motion is denied. The *Almeida-Sanchez* stay is also denied.

Mr. Shapery, we can't bog this court down with determinations of *Almeida-Sanchez* or determinations of *Mendez Rodriquez* just because they are before the Supreme Court. If that were the case, about two-thirds of the cases, or maybe even eighty percent of the cases—well, very likely, eighty percent of all of the cases, whether they were marijuana cases or whether they were alien cases, would be drawn to a complete halt, because

Judge Browning wrote a dissent in *Almeida-Sanchez*, so, without speaking to the merit of that dissent, the law still is that Border Patrol Agents have this right to stop under the Statute and so that motion, too, will be denied.

The matter is transferred back up to Judge Schwartz for—has there been a trial set? How does he do that?

MR. COFFIN: Perhaps—if the case is going back up to Judge Schwartz, I imagine he would set a trial date today.

THE COURT: Well, I would suggest, then, that you gentlemen—I just took the case for the purpose of hearing the motions.

MR. SHAPERY: Your Honor, we could get together and set a time to see Judge Schwartz again on the matter.

[39] THE COURT: All right. I would suggest that you proceed now back up to Judge Schwartz' Court, and tell him what you would like to see—or as soon as you get an opportunity, to be heard; that you would like to have a trial date, so that the Defendant can be present and he can be aware of the trial date.

MR. SHAPERY: Thank you, Your Honor.

MR. COFFIN: Your Honor, one further matter, if I may. May it be stipulated that the evidence—the physical evidence here at the Motion Hearing may be released back to the Customs possession?

THE COURT: We have never admitted it into evidence.

MR. COFFIN: All right.

THE COURT: It was just brought before the Court for identification.

(Adjournment.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

[Filed May 17, 1973, Clerk, U.S. District Court, Southern District of California. By Jo Larson, Deputy]

Criminal No. 14780

UNITED STATES OF AMERCIA, PLAINTIFF,

v.

JAMES ROBERT PELTIER, DEFENDANT

STIPULATION

HARRY D. STEWARD
United States Attorney
STEPHEN G. NELSON
Assistant U.S. Attorney
Chief, Criminal Division
THOMAS M. COFFIN
Assistant U.S. Attorney
United States Courthouse
325 West F Street
San Diego, California 92101

Attorneys for Plaintiff,
United States of American

It is hereby stipulated by and between the Plaintiff, United States of America, and the Defendant, James Robert Peltier, through himself and through his attorney of record, Sandor W. Shapery, that:

1. The Court may consider the evidence adduced at the hearing on the motion to suppress in rendering a verdict upon the trial of the case;

2. The substance seized from the 1962 Chevrolet driven and solely occupied by the defendant Peltier on February 28, 1973, is in fact marijuana, of the approximate quantity of 270 pounds, and has been the continuous

custody of the United States government since the time of its seizure on the above date. It is further stipulated that this marijuana need not be physically introduced into evidence at the trial of the case, but the Court may consider it as having been so introduced, subject to the defendants' objection on the grounds advanced in his motion to suppress;

3. The defendant James Robert Peltier did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973;

4. Finally, it is expressly agreed that the above stipulations would not be entered into had the defendant's motion to suppress in the case been granted.

DATED: 5/17/73

HARRY D. STEWARD
United States Attorney

STEPHEN G. NELSON
Assistant U.S. Attorney
Chief, Criminal Division

/s/ Thomas M. Coffin
THOMAS M. COFFIN
Assistant U.S. Attorney

Attorneys for Plaintiff
United States of America

/s/ James Robert Peltier
JAMES ROBERT PELTIER
Defendant

/s/ Sandor W. Shapery
SANDOR W. SHAPERY
Attorney for Defendant

[1] TRIAL TRANSCRIPT

SAN DIEGO, CALIFORNIA,

THURSDAY, MAY 17, 1973, AT 10:15 AM

THE CLERK: Number 1 on calendar, case No. 14780, USA v. James Robert Peltier, for jury trial.

MR. SHAPERY: Ready, your Honor. There's been a jury waiver filed in that matter.

THE COURT: Is the jury waiver already on file?

THE CLERK: No, your Honor.

MR. COFFIN: Your Honor, it's been—

THE COURT: Oh, all right, will you please advise the defendant as to his rights.

THE CLERK: James Robert Peltier, you're informed you're entitled to a trial by a jury of 12 persons who must all find you either guilty or not guilty. You have a right to have witnesses summoned to testify in your behalf, and a right to confront and cross examine the Government witnesses who will testify against you.

You're further informed you have a right to take the witness stand to testify in your own behalf, or you may remain silent, as you cannot be required to testify.

If you desire to waive a jury trial, you may have a trial by the Court, who will hear the testimony of both sides and make the decision as to whether you are guilty or not guilty. Is it your desire to waive a jury trial?

DEFT. PELITER: Yes.

[2] MR. COFFIN: Your Honor, the jury waiver form has been signed by the defendant, his attorney, and myself, and I present it to your Honor for approval.

THE COURT: Mr. Peltier—is it Peltier or Pel-tyay?

DEFT. PELTIER: Peltier.

THE COURT: Mr. Peltier, have you discussed this matter of the waiver of jury trial with your attorney?

DEFT. PELTIER: Yes, sir.

THE COURT: And do you understand what you're doing as far as waiving a jury is concerned?

DEFT. PELTIER: Yes, sir.

THE COURT: Now, I want to point out to you that if you were tried by a jury, which is your right, it would be a jury of 12 persons, and all of them would have to make up their minds on the question of your guilt or innocence of the charges against you. Their verdict would have to be unanimous.

If you're tried just by the Court, it's only the Judge who has to make the determination as to whether you're guilty or innocent. Do you understand that?

DEFT. PELTIER: Yes, sir.

THE COURT: And do you still wish to waive your right to a jury trial and the other rights that go with it?

DEFT. PELTIER: Yes.

THE COURT: All right, the Court will now approve the [3] waiver of jury trial and it may be filed by the Clerk, and jury trial is waived in this case.

MR. COFFIN: Your Honor, the Government has prepared a stipulation as to the facts for this case to be tried on. I'd like to present a copy of that to your Honor now and perhaps your Honor would desire to advise the defendant of certain of his other rights he might be giving up by entering a stipulation.

THE COURT: All right, now, has a copy of this stipulation been provided to Mr. Shapery?

MR. COFFIN: Yes, your Honor, he has the original, which I've signed.

MR. SHAPERY: Yes, your Honor.

THE COURT: Now, has this been signed by yourself, Mr. Coffin, by Mr. Shapery, and by Mr. Peltier?

MR. COFFIN: The original's been signed by myself, and I don't think it has yet been signed by Mr. Shapery or Mr. Peltier. I don't—

THE COURT: All right. Before you say anything, let me just take a quick glance at it.

BY THE COURT:

Q. All right. Now, Mr. Peltier, in connection with this stipulation, have you had an opportunity to read it yet?

A. Yes, sir, I have.

Q. Now, you realize that ordinarily, at the trial of [4] a case such as this one, witness would be brought in by the Government. They would be sworn and they'd take the stand and they would testify from the stand under oath. You would have the right, through your attorney, to cross examine all of those witnesses and, as we say in the law, to confront the witnesses and be confronted by them.

In proceeding by way of a stipulation such as this, you are not having that opportunity, that is, the witnesses are not being called here live. Now, some witnesses were called to testify on the motion to suppress, and of course, those were under oath and were cross examined by your attorney.

Now, do you understand that you do have the right to confront witnesses, be confronted by them, and to cross examine them?

A. Yes, sir, I—

Q. And are you willing to waive and give up those rights?

A. Yes, I am.

THE COURT: All right. You've advised Mr. Peltier fully in this matter, have you, Mr. Shapery, regarding his rights of confrontation, cross examination, and so on?

MR. SHAPERY: Yes, I have, your Honor.

THE COURT: And it's on the basis of your discussions with him that this stipulation is being entered into?

[5] MR. SHAPERY: That is correct, your Honor. However, I would like the record to reflect the fact that the stipulation is conditional on the motion to suppress. In the event that it is appealed and there is a reversal, this stipulation—

THE COURT: Yes, I understand. In other words, you want to reserve your right and the right of the defendant with regard to the propriety of the ruling on the motion to suppress. Is that correct?

MR. SHAPERY: That's correct, your Honor.

THE COURT: All right. I think this stipulation in its terms does that.

MR. COFFIN: Your Honor, I have a transcript of the motion.

THE COURT: That's what I was concerned about. All right.

MR. COFFIN: These were heard before Judge Thompson on April 16th.

THE COURT: Yes. All right, Mr. Shapery, have you signed the stipulation?

MR. SHAPERY: Yes, I have, your Honor.

THE COURT: Has Mr. Peltier signed the stipulation?

MR. SHAPERY: Yes, he has.

MR. COFFIN: Your Honor, if I may, I would suggest one further point before the stipulation is accepted, because of the contents of paragraph 3 in the stipulation. It might be [6] advisable for the Court to caution Mr. Peltier about the maximum penalty in the case.

BY THE COURT:

Q. Mr. Peltier, has your attorney, Mr. Shapery, discussed with you the possible penalties under the law for this offense?

A. Yes, sir.

Q. And in that regard, has he advised you that the possible penalty under the law is a fine of up to $15,000, up to five years' imprisonment, and that both the fine and imprisonment could be imposed?

A. Yes, sir.

Q. Has he also advised you that in the event that any term of custody was imposed, that on your release from custody, you'd be required under the law to serve a special term of parole of two years?

A. Yes, sir, I understand that.

Q. All right. How old are you, Mr. Peltier?

A. Twenty-nine.

Q. Are you presently under probation or parole on any other offense or charge anywhere else?

A. No, sir.

Q. You're not subject to any other charge in any other court, whether it be State or Federal?

A. No, sir.

[7] MR. SHAPERY: Mr. Peltier's never been arrested before.

THE COURT: Is that in accordance with your understanding, Mr. Coffin?

MR. COFFIN: Yes, it is, your Honor.

BY THE COURT:

Q. All right. Now, having in mind the possible penalties for the offense with which you're charged, do you still wish to enter into this stipulation?

A. Yes, sir, I do.

Q. And you understand that the matter of sentencing, if it should come to that, would be entirely within the discretion of the Court?

A. Yes, I understand that.

MR. SHAPERY: Your Honor, I would also like the record to reflect that it was through mutual agreement with the U.S. Attorney that in the event an appeal is filed, the bond that is presently outstanding could be transferred to the appeal and would not require incarceration at that time.

MR. COFFIN: That's correct. I agreed, your Honor, not to ask that the defendant be remanded.

THE COURT: In other words, in the event that he were found guilty of the offense, he would continue on bail during and pending his appeal.

MR. COFFIN: Right.

THE COURT: Providing the appeal, if one is taken, is [8] prosecuted—

MR. SHAPERY: Timely.

THE COURT: —expeditiously and timely and that the defendant does not violate any of the terms of the bond on appeal.

MR. SHAPERY: That's correct, your Honor.

THE COURT: All right, anything further at this time? Has the stipulation been filed? Will you please hand it to the Clerk for filing.

THE CLERK: The stipulation has now been filed, your Honor.

THE COURT: May I see it? All right, Mr. Coffin, anything further to be presented—

MR. COFFIN: No, your Honor, the Government would rest.

THE COURT: —on behalf of the Government?

Were there any exhibits presented at the time of the suppression hearing?

MR. COFFIN: There were some suitcases and some plastic bags containing marijuana that were taken from the car at the Chevrolet—the Chevrolet.

THE COURT: Is it your feeling that, in view of the contents of the stipulation, there's no need to offer any of those exhibits in this trial?

MR. COFFIN: Yes, your Honor. The stipulation provides that they need not be physically introduced into evidence.

[9] THE COURT: Yes. Well, I was aware of what it provides with regard to the marijuana, but I just wondered as to any other items of physical evidence that were presented at the suppression hearing.

MR. COFFIN: No, it's also provided that the Court may consider all the evidence adduced at the hearing and that would include physical, too, your Honor.

THE COURT: All right, anything further, Mr. Coffin?

MR. COFFIN: No, your Honor. The Government would rest.

THE COURT: Does the defendant intend to offer any testimony or evidence at this time?

MR. SHAPERY: Your Honor, we intend to offer no evidence at this time. However, we would request that a probation report be prepared.

THE COURT: Well, before making a determination in this matter, I think I've got—since this suppression hearing was not heard by me, I think I have to read through the transcript of the testimony before I make a ruling on it.

MR. SHAPERY: Okay.

THE COURT: So we can recess this matter for a few minutes, at least, while I do read the transcript.

MR. COFFIN: All right.

THE COURT: Court will be in recess, then.

(Court recessed at 10:30 a.m., to reconvene at 10:45 a.m.)

[10] THE COURT: In this matter, case No. 14780, United States of America v. James Robert Peltier, I have read the stipulation in writing that has been filed by the parties. I've also read the transcript of the proceedings of April 16th, 1973, taken before Judge Gordon Thompson on the motion to suppress the evidence, which motion was denied, and on the basis of the evidence that is now before this Court, through the stipulation and the transcript of the proceedings on the motion to suppress, I'm convinced beyond a reasonable doubt that the defendant, James Robert Peltier, is guilty of the charge contained in the single-count indictment, Count 1 in case No. 14780, and it will be the finding of the Court that he is guilty.

Probation investigation and report will be ordered.

THE CLERK: June 25th, your Honor?

THE COURT: The matter will be set for sentencing and further proceedings on June 25th, 1973, at 9:00 a.m. And Mr. Peltier is directed at this time to report to the Probation Office on Front Street. That's 702 Front Street. Do you know where it is, Mr. Shapery?

MR. SHAPERY: Yes.

THE COURT: All right. And will you see to it that Mr. Peltier goes over there immediately.

The original deposition should be filed in the matter.

MR. SHAPERY: Thank you, your Honor.

[11] THE COURT: Your Honor, may I have the—may the transcript be released back to the Government?

THE COURT: The transcript released?

MR. COFFIN: Of the motion, on—

THE COURT: Well, the original, really, should be filed with the Court. Isn't there a copy somewhere?

MR. COFFIN: I'll come up and make a copy. When it goes up on appeal, it will be designated as part of the record.

THE COURT: Well, but if the transcript of the proceedings is considered by me in the matter, I think it should be filed in the case.

MR. COFFIN: Okay.

THE COURT: I mean, it's considered by me as evidence. I think it should be filed, rather than left in the possession of the U.S. Attorney. Not that you're going to do anything with it, but—

MR. SHAPERY: Thank you, your Honor.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 14780—Criminal

[Entered Jun. 25, 1973, Clerk, U.S. District Court, Southern District of California. By [Illegible], Deputy]

UNITED STATES OF AMERICA

v.

JAMES ROBERT PELTIER

On this 25th day of June, 1973 came the attorney for the government and the defendant appeared in person and [1] by counsel, Sandor Shapery.

IT IS ADJUDGED that the defendant upon his plea of [2] not guilty and a finding of guilty has been convicted of the offense of possession of a controlled substance with intent to distribute, in violation of 21 USC 841(a)(1), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

---

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

representative for imprisonment for a period of [4] one (1) year and one (1) day and pursuant to 18 USC 4208 (a) (2), the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the Board of Parole.

IT IS ORDERED that in addition to such term of imprisonment, defendant is hereby required to serve a special parole term of two (2) years as prescribed by 21 USC 841(b) (1) (B).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Filed: June 25, 1973

/s/ Edward A. Schwartz
EDWARD A. SCHWARTZ
United States District Judge

WILLIAM W. LUDDY
Clerk

By: /s/ D. M. Pellaton
D. M. PELLATON
Deputy Clerk

---

[4] Enter (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court to recommend a particular institution.

SUPREME COURT OF THE UNITED STATES

No. 73-2000

UNITED STATES, PETITIONER

v.

JAMES ROBERT PELTIER

ORDER ALLOWING CERTIORARI. Filed November 11, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is set for oral argument in tandem with No. 73-2050, U.S. v. Ortiz; No. 73-6848, Bowen v. U.S.; and No. 74-114, U.S. v. Brignoni-Ponce.

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Supreme Court, U. S.
FILED
OCT 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

JAMES ROBERT PELTIER,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for the Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,

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- vs -

JAMES ROBERT PELTIER,

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 500 F. 2d 985.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266, articulated a new doctrine or simply reaffirmed well-established Fourth Amendment standards.

2. Whether Respondent who, like Almeida-Sanchez, challenged on constitutional grounds the validity of the search of his automobile throughout the District Court and Court of Appeals' proceedings, is to be afforded the same relief as that previously afforded in Almeida-Sanchez.

STATEMENT

Petitioner's statement of the case is substantially correct.

REASONS FOR DENYING THE WRIT

I. The manner in which the Court of Appeals disposed of the present case precludes effective review on the issue of whether this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266, should be applied retroactively. Although Petitioner asserts that the decision below is in direct conflict on the issue of retroactivity with the recent decision of the Court of Appeals for the Fifth Circuit in United States v. Miller, 492 F. 2d 37, a careful reading of the two opinions reveals that such is not the case.

Whereas in Miller the Fifth Circuit defined the issue at bar as "whether Almeida-Sanchez should be given retrospective application" (492 F. 2d at 40), a majority of the Court of Appeals in the present case found it unnecessary to consider the question of retroactivity for reasons discussed herein.

Petitioner's statement of the facts in Miller is substantially correct and need not be reiterated. (Pet., p. 9). The Fifth Circuit approached the issue of retroactivity by initially asserting that "Almeida-Sanchez announced a 'new rule' which invalidates searches conducted without probable cause anywhere but at the border or its functional equivalent." (492 F. 2d at 40-41). The decision fails to reveal any analysis of the question of what constitutes a "new rule", nor does it examine this Court's language in Almeida-Sanchez to ascertain whether in fact a new constitutional doctrine was articulated.

Following the Fifth Circuit's determination that Almeida-Sanchez announced a new legal principle, the Court proceeded to the question of whether the "new rule" was to be given retroactive effect in light of the criteria established by this Court in such cases as Desist v. United States, 394 U.S. 244, and Stovall v. Denno, 388 U.S. 293. Ultimately, Miller's conviction was affirmed as the Fifth Circuit concluded that Almeida-Sanchez "should be given only prospective application" (492 F.2d at 42).

Unlike the Fifth Circuit, the Court of Appeals in the present case found it unnecessary to consider whether Almeida-Sanchez should be applied retroactively. The Court properly recognized that "for the doctrine of retroactivity to be relevant at all, the [Supreme] Court must have articulated a new doctrine." (Pet. App. A, p. 3a). Support for this contention is found in a recent decision of this Court in which it was stated that, "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." Milton v. Wainwright, 407 U.S. 371, 381-82, n. 2 (1972) (dissenting opinion of Mr. Justice Stewart) (citations omitted).

The Court below then turned to the question of whether Almeida-Sanchez did, in fact, represent the announcement of a "new rule" by this Court. Relying upon Mr. Justice Stewart's assertion in Almeida-Sanchez that "neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case," (413 U.S. at 272), the Court of Appeals concluded that this Court "was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in Almeida-Sanchez, not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court" (Pet. App. A, p. 9a).

The Petition for a Writ of Certiorari should be denied inasmuch as the Court of Appeals in Peltier did not reach the issue of whether Almeida-

Sanchez should be applied retroactively. This Court has repeatedly asserted that only under rare circumstances will it consider questions not decided by the Court below.

> "This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here." (Blair v. Oesterlein Machine Co., 275 U.S. 220, 225).

Assuming that this Court were to accept the Peltier case for review and determine that the rule announced in Almeida-Sanchez constitutes a new legal doctrine, the failure of the Court below to consider the substantive question of retroactivity might preclude this Court from addressing itself to that issue.

II. The decision below is in full accord with principles expressed in decisions of this Court. The Court of Appeals acknowledged, correctly in our view, that the issue of retroactivity arises only when this Court enunciates a new legal doctrine. (Pet. App. A., p. 3a).

Significantly, there is no language in Almeida-Sanchez which supports Petitioner's claim that the decision announced a new rule. Following a careful review of prior automobile search cases and administrative inspection cases, Mr. Justice Stewart concluded that neither line of authority provided "any support for the constitutionality of the stop and search in the present case." 413 U.S. at 272. This Court announced that its decision was controlled by Mr. Justice Taft's opinion in Carroll v. United States, 267 U.S. 132 in which it was established that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U.S. at 153-54.

Such language lends strong support to the Court of Appeals' holding in Peltier that Almeida-Sanchez neither overruled earlier decision of this

Court nor disturbed long accepted and widely relied upon practice. Rather, Almeida-Sanchez "reaffirmed well-established Fourth Amendment standards dating back to Weeks v. United States, 232 U.S. 383 (1914), and Carroll v. United States, 267 U.S. 132 (1925)" (Pet. App. A., p. 6a).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DATED: 22 October 1974

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Telephone: (714) 459-9227

Attorney for the Respondent

Supreme Court, U. S.
FILED
JAN 6 1975
MICHAEL RODAK, JR., CLERK

No. 73-2000

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ROBERT PELTIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ROBERT PELTIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–19a) is reported at 500 F. 2d 985.

JURISDICTION

The *en banc* judgment of the court of appeals (Pet. App. 20a–21a) was entered on May 9, 1974. On June 3, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 8, 1974. The petition was filed on that date and was granted on November 11, 1974 (A. 39). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, should be applied retroactively.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

2. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or

> any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.
>
> (b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

On March 7, 1973, an indictment (A. 4) was returned in the United States District Court for the Southern District of California charging that respondent had knowingly and intentionally possessed, with intent to distribute, approximately 270 pounds of marihuana, in violation of 21 U.S.C. 841(a)(1). Respondent's subsequent motion to suppress evidence was denied after a hearing (A. 5–26). On May 17,

1973, after respondent waived his right to a jury trial, the case was submitted to the district court on the basis of stipulated facts (A. 27–28) and the transcript of the suppression hearing, and the court found respondent guilty as charged (A. 35). Respondent was sentenced to imprisonment for one year and one day, with immediate eligibility for parole pursuant to 18 U.S.C. 4208(a)(2), and to a special parole term of two years pursuant to 21 U.S.C. 841(b)(1)(B) (A. 37–38). The court of appeals, sitting *en banc,* reversed the judgment of conviction in a 7–6 decision and remanded the case to the district court with instructions to suppress the evidence seized in the search of respondent's automobile (Pet. App. 1a–19a).

1. It was stipulated at trial that respondent knowingly and intentionally possessed, with intent to distribute, the 270 pounds of marihuana that were discovered in his automobile by Border Patrol officers on February 28, 1973 (A. 28).[1] The facts surrounding the seizure of the marihuana were adduced at the suppression hearing through the testimony of the two Border Patrol officers who participated in the stop and search of respondent's vehicle. Respondent presented no evidence at the hearing.

Border Patrol Agent Charles Ainscoe testified that he and Agent William Pfiester were conducting a roving immigration patrol near Temecula, California, at

[1] The stipulation stated that it "would not [have been] entered into had the defendant's motion to suppress in the case been granted" (A. 28).

about 2:30 A.M. on February 28, 1973, when they observed respondent traveling north on Highway 395, approximately 70 air miles from the Mexican border (A. 6–7, 12).[2] The officers knew that the road was frequently used by smugglers to transport aliens who have entered the country illegally (A. 8), and their suspicions were aroused because respondent was driving an old model car and appeared to be of Mexican descent (A. 12, 16).[3] They therefore pursued and stopped respondent in order to inspect his vehicle for the presence of concealed aliens (A. 7–8).

As Agent Ainscoe approached the vehicle, he observed that it bore out-of-state license plates, that respondent was alone in the car, and that there were some clothes in the back seat (A. 7, 13). He informed respondent that he was conducting a "routine immigration inspection," and he asked respondent to open the trunk of the car (A. 7–8). As respondent unlocked the trunk, Ainscoe observed that the key had attached to it a tag like those frequently used for rental vehicles (A. 8).

When the trunk was opened, the officer could see several suitcases and several plastic garbage bags (A. 8–9). The plastic bags appeared to the officer to contain kilo-size, rectangular bricks of marihuana (A.

[2] When the officers observed him, respondent was approximately a mile and a half north of the fixed immigration checkpoint at Temecula, which was not in operation at the time (A. 7).

[3] The district court found that, while respondent "apparently * * * is of French extraction based upon his name, he does look to be dark-skinned and at night, that could easily be the case, that he would appear to be of Mexican descent" (A. 23).

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9–10). "[T]hey were full of marihuana kilos, and they were pretty easily seen, they weren't symmetrical, the edges were sticking out every which way" (A. 9). Ainscoe had seen marihuana bricks on 20 or 30 prior occasions, including instances when the bricks had been packed in plastic garbage bags (A. 10). As he reached into the back of the trunk to inspect the bags, the officer detected the odor of marihuana (A. 10–11), which he had previously smelled "dozens of times" (A. 15–16). He then tore open the bags and discovered the marihuana that respondent was charged with possessing (A. 10–11, 24).

2. In his motion papers and at the suppression hearing, which preceded this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, respondent conceded that existing case law supported the Border Patrol's authority to stop and search vehicles for aliens without a warrant or probable cause. He argued, however, that, when the officer saw that the trunk contained no aliens, his authority ended and he could conduct a further search only if he had probable cause to do so. Respondent claimed that the officer's observation of the plastic garbage bags did not give him probable cause to believe that they contained contraband.

The district court denied the motion to suppress. It found that, in light of the officer's "experience in his job," he had probable cause to inspect the garbage bags "even before he smelled the marihuana, when he saw these protruding objects which, to him, resembled brick-shaped objects of marihuana" (A. 25).

3. On appeal, the government acknowledged and the court of appeals stated (Pet. App. 2a) that the search and seizure in this case was similar to the one declared unlawful by this Court in *Almeida-Sanchez.* We argued, however, that the ruling should not be applied retroactively to searches conducted prior to June 21, 1973, the date of the decision in that case.

A divided court of appeals, sitting *en banc,* nonetheless held that the rule of *Almeida-Sanchez* "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced" (Pet. App. 1a).[4] The majority concluded that the question of retroactivity was not truly presented, because *Almeida-Sanchez* "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (*id.* at 5a). The court conceded that several of its own pre-*Almeida-Sanchez* opinions since 1961, upholding the validity of warrantless *checkpoint* searches for aliens, "contain some dicta from which the government might infer that this court would uphold a roving-patrol search" (*id.* at 6a, n. 3). It also acknowledged that it had expressly held in 1970 that "government agents on roving patrol can stop and search automobiles without either probable cause or warrant" (*id.* at 6a). *United States* v. *Miranda,* 426 F. 2d 283.

The majority reasoned, however, that "our line of decisions, and that of the Court of Appeals for the Tenth Circuit * * *, permitting roving searches by

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[4] The court specifically reserved the question whether *Almeida-Sanchez* would apply in the case of a collateral attack upon a final conviction (Pet. App. 2a, n. 1).

the border patrol, enjoyed only brief acceptance and failed its first test before the Supreme Court" (Pet. App. 7a). The court therefore concluded (*id.* at 9a):

> The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. Peltier is entitled to the benefit of the rule announced in *Almeida-Sanchez,* not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court.[5]

The six dissenting judges, noting that both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* recognized that the decision was a departure from the existing law in each of the three courts of appeals whose jurisdiction includes the Mexican border area (*id.* at 12a–13a),[6] concluded that, even under the

[5] The court of appeals held in another *en banc* decision announced the same day as the present case (*United States* v. *Bowen*, 500 F. 2d 960, certiorari granted, October 15, 1974, No. 73–6848) that warrantless checkpoint searches, like roving patrol searches, violate the Fourth Amendment. It also held, however, that the exclusionary rule should be applied only to checkpoint searches conducted after this Court's decision in *Almeida-Sanchez*. The court of appeals stated in *Bowen* that, as applied to checkpoint searches, in contrast to roving patrol searches, *Almeida-Sanchez* "overrules clear past precedent, both statutory and case law," and "disrupts a practice long accepted and widely relied upon" (500 F. 2d at 977). We argue in *Bowen* and in *United States* v. *Ortiz*, No. 73–2050, that it was *Bowen*, not *Almeida-Sanchez*, that accomplished that result with respect to checkpoint searches in the Ninth Circuit.

[6] Mr. Justice Powell stated: "Roving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated

majority's standards, "the rule of *Almeida-Sanchez* is new" (*id.* at 13a) and the question of retroactivity must therefore be decided. The dissenting opinion reasoned that *Almeida-Sanchez* overruled established law, decisional as well as statutory,[7] concerning the Border Patrol's authority to conduct roving patrol checks of vehicles for aliens (*id.* at 13a–14a); that the prior law, though much of it was stated in dicta, had been "widely relied upon" (*id.* at 17a), and the "law enforcement practice, authorized for over a decade," had been "long accepted" (*id.* at 17a–18a); and that the result in *Almeida-Sanchez* "was not foreshadowed" (*id.* at 16a).

The dissenting judges therefore reached the question of retroactivity and, on the basis of the standards established by this Court in *Stovall* v. *Denno,* 388 U.S. 293, concluded that the deterrent purpose of the exclusionary rule would not be served by applying *Almeida-Sanchez* to roving patrol searches conducted prior to June 21, 1973 (Pet. App. 18a–19a).

The decision of the court of appeals in the present case is in conflict with the decision of the Fifth Circuit in *United States* v. *Miller,* 492 F. 2d 37, pending

that the courts "have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today" (*id.* at 298).

[7] Under 8 U.S.C. 1357(a), immigration officers are given "power without warrant— * * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." By regulation, the term "reasonable distance" has been given an outside limit of "100 air miles from any external boundary" (8 C.F.R. 287.1(a)(2)).

on petition for a writ of certiorari, No. 73–6975, in which that court ruled, in harmony with the dissenting opinion in this case, that "*Almeida-Sanchez* announced a 'new rule'" overturning "an unbroken line of decisions by this Court" (492 F. 2d at 40, 41), that it established "a new exclusionary rule which law enforcement officials could not have foreseen" (*id.* at 41), and that it "should be given only prospective application" (*id.* at 42). The Fifth Circuit accordingly upheld a conviction based on evidence seized in a warrantless roving patrol search that occurred prior to this Court's decision in *Almeida-Sanchez*.[8]

[8] *Miller* was decided by a three-judge panel, but the full court subsequently issued a unanimous *en banc* order in response to a petition for rehearing and suggestion for rehearing *en banc*. That order, dated July 8, 1974, is set forth as an appendix to the supplemental petition for a writ of certiorari pending before this Court in *Miller*. It stated: "The Court has considered the petition for rehearing *en banc* with respect to the retroactivity issue only, and is of the opinion that the decision of the panel is correct."

The Court of Appeals for the Tenth Circuit, though it has not decided the retroactivity of *Almeida-Sanchez* as applied to roving patrol searches, has held, incorrectly in our view, that the principles of that decision apply to checkpoint searches occurring prior to June 21, 1973, if the defendant preserved the issue at trial and on direct appeal. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court's reasoning—that one who has raised the issue and whose case was pending at the time of this Court's decision should "be given the same relief as has been afforded in *Almeida-Sanchez*" (485 F. 2d at 359)—would appear to extend to roving patrol searches as well.

ARGUMENT

THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ* SHOULD NOT BE APPLIED RETROACTIVELY TO EXCLUDE EVIDENCE SEIZED IN A ROVING PATROL SEARCH CONDUCTED PRIOR TO THE DATE OF THAT DECISION

A. INTRODUCTION AND SUMMARY

The focus in this case is on whether *Almeida-Sanchez* is the kind of decision that even raises a question of retroactivity. The threshold test applied by the court of appeals was drawn from Mr. Justice Stewart's dissenting opinion in *Milton* v. *Wainwright*, 407 U.S. 371, 381–382, n. 2: "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon * * *."[9]

The court of appeals concluded, in the context of the warrantless roving patrol search that was involved in the present case, that the decision in *Almeida-Sanchez* presents no retroactivity question, because it "neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice" (Pet. App. 5a). By contrast, a different majority of the

[9] See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106: "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *."

same court ruled in *United States* v. *Bowen, supra,* that the decision in *Almeida-Sanchez* does present a retroactivity issue in the context of a warrantless *checkpoint* search of a vehicle for aliens and should be applied only prospectively to such searches.

The majority in the present case recognized that prior Ninth Circuit decisions upholding the lawfulness of warrantless checkpoint searches rested on a broad rationale that would apply equally to roving patrol searches. It discounted the significance of those decisions, however, on the ground that the opinions, insofar as roving patrol searches are concerned, were mere dicta. The court reasoned that, apart from its own decision in *Almeida-Sanchez,* it had specifically upheld a roving patrol search only once and only a few years before this Court decided *Almeida-Sanchez.* The court of appeals concluded that its two clear holdings prior to this Court's decision were of neither sufficient vintage nor, apparently, sufficient authority either to constitute clear past precedent for purposes of retroactivity analysis or to support the Border Patrol's long-established practice, in reliance upon express statutory authority, of conducting roving patrol searches of vehicles for aliens in the Mexican border area.

We argue that this Court's decision in *Almeida-Sanchez* "was a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) that departed from the prior administrative and judicial interpretation of the Border Patrol's statutory authority and overruled past precedent in the Ninth Circuit and elsewhere.

Since a legislative enactment "guides law enforcement personnel and courts until abrogated" (*United States* v. *Bowen, supra,* 500 F. 2d at 977), the Border Patrol would have been "entitled to rely on a presumptively valid * * * statute, enacted in good faith and by no means plainly unlawful" (*Lemon* v. *Kurtzman,* 411 U.S. 192, 209; plurality opinion), even if it had never been judicially tested. The statute authorizing warrantless searches of vehicles for aliens in the border areas, however, had been repeatedly tested, in the context of both checkpoint and roving patrol searches, and the courts of appeals, including the Ninth Circuit, had uniformly upheld the statute and its application.

Prior to this Court's decision in *Almeida-Sanchez,* no court had suggested that there might be a significant legal distinction between checkpoint and roving patrol searches. Decisions upholding checkpoint operations appeared to validate roving patrol operations as well. In any event, the Ninth Circuit specifically sustained a roving patrol search in 1970. One such decision by a court of appeals is enough, we submit, to constitute clear past precedent. The court of appeals' suggestion in the present case that a decision of this Court can present a question of retroactivity only if it overrules one of this Court's own prior decisions is contradicted by, for example, *Chevron Oil Co.* v. *Huson,* 404 U.S. 97.

By invalidating a warrantless roving patrol search of an automobile for concealed aliens, this Court's decision in *Almeida-Sanchez* not only overruled prior statutory and decisional law but also disrupted a long

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accepted law enforcement practice that had been employed by the Border Patrol for many years in the area of this country's border with Mexico. Thus, under either of the criteria relied on by the court of appeals in the present case, the decision in *Almeida-Sanchez* presents a choice between retroactivity and non-retroactivity.

This Court's prior decisions make it clear how that choice should be exercised in the present case. As a new application of the Fourth Amendment's exclusionary rule, the decision in *Almeida-Sanchez* should be given prospective application only. The deterrent purpose of the exclusionary rule would not be furthered by applying it to pre-*Almeida-Sanchez* roving patrol searches conducted in good faith reliance on existing statutory and decisional authority.

B. *ALMEIDA-SANCHEZ* WAS A NEW APPLICATION OF THE EVIDENTIARY EXCLUSIONARY RULE; IT OVERRULED CLEAR PAST PRECEDENT IN THE COURTS OF APPEALS AND DISRUPTED AN IMMIGRATION LAW ENFORCEMENT PRACTICE LONG ACCEPTED AND WIDELY RELIED UPON IN THE MEXICAN BORDER AREA

The holding of the court of appeals in this case rests upon two erroneous premises. The first is that the overruling of past precedent raises a retroactivity question only when the past precedent consists of this Court's own decisions. The second is that two clear holdings by a court of appeals plus repeated statements in dicta concerning the validity of a particular law enforcement practice neither amount to clear past precedent nor provide a basis upon which law enforcement officers may reasonably rely in the exercise of their official responsibilities.

1. The validity of a warrantless roving patrol search of a vehicle was addressed by this Court for the first time in *Almeida-Sanchez*. Though the Court ruled that such a search is unlawful in the absence of particularized probable cause or reasonable suspicion focused on the automobile to be searched, the decision marked a departure from the established law in each of the courts of appeals whose jurisdiction includes the area of this country's border with Mexico.

The Border Patrol has conducted warrantless, routine, immigration inspections of vehicles for concealed aliens in the border areas, both by roving patrols and at traffic checkpoints, for nearly 50 years. The practice was expressly authorized by Congress in 1946 (60 Stat. 865) in legislation that empowered immigration officers, within a reasonable distance from an external boundary, to search any vehicle for aliens without a warrant and without individualized probable cause or suspicion. The language of that enactment, with some modification, was carried forward in Section 287(a)(3) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1357(a)(3), which provides that immigration officers "shall have power without warrant—* * * (3) within a reasonable distance from any external boundary of the United States, to * * * search for aliens any * * * vehicle * * *." It is in accordance with the authority conferred by that section, as implemented by pub-

lished regulations (8 C.F.R. 287.1),[10] that the Border Patrol conducted its checkpoint and roving patrol traffic checking operations prior to *Almeida-Sanchez*.

Decisions of the Fifth, Ninth, and Tenth Circuits repeatedly and uniformly sustained the constitutionality of the statute and the reasonableness of stops and limited searches of vehicles for aliens conducted pursuant to the authority conferred by the statute.[11] Although most of the decisions involved stops and searches at fixed immigration checkpoints, several involved stops and searches by Border Patrol officers conducting roving patrol traffic checking operations.

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[10] The regulations define "reasonable distance" as "within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director" (8 C.F.R. 287.1(a)(2)).

[11] Fifth Circuit: *Kelly* v. *United States*, 197 F. 162; *Haerr* v. *United States*, 240 F. 2d 533; *Ramirez* v. *United States*, 263 F. 2d 385; *United States* v. *Maggard*, 451 F. 2d 502; *United States* v. *Bird*, 456 F. 2d 1023, certiorari denied, 413 U.S. 919; *United States* v. *DeLeon*, 462 F. 2d 170, certiorari denied, 414 U.S. 853; *United States* v. *McDaniel*, 463 F. 2d 129, certiorari denied, 413 U.S. 919; *United States* v. *Wright*, 476 F. 2d 1027.

Ninth Circuit: *Fernandez* v. *United States*, 321 F. 2d 283; *Barba-Reyes* v. *United States*, 387 F. 2d 91; *United States* v. *Elder*, 425 F. 2d 1002; *United States* v. *Miranda*, 426 F. 2d 283; *United States* v. *Avey*, 428 F. 2d 1159, certiorari denied, 400 U.S. 903; *Fumagalli* v. *United States*, 429 F. 2d 1011; *United States* v. *Sanchez-Mata*, 429 F. 2d 1391; *Duprez* v. *United States*, 435 F. 2d 1276; *United States* v. *Marin*, 444 F. 2d 86; *United States* v. *Almeida-Sanchez*, 452 F. 2d 459, reversed, 413 U.S. 266; *Mienke* v. *United States*, 452 F. 2d 1076; *United States* v. *Foerster*, 455 F. 2d 981, vacated and remanded, 413 U.S. 915; *United States* v. *Aranda*, 457 F. 2d 761.

Tenth Circuit: *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206; *United States* v. *McCormick*, 468 F. 2d 68, certiorari denied, 410 U.S. 927; *United States* v. *Anderson*, 468 F. 2d 1280.

In *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9), for example, a Border Patrol officer on roving patrol stopped a car near the San Clemente checkpoint on Interstate Route 5 about 60 to 70 miles north of the Mexican border. Searching for concealed aliens, the officer looked under the hood of the car. He found no aliens, but he did discover marihuana in the fender wells. The Ninth Circuit, relying on its prior decisions involving checkpoint searches, held that the "regulation, and the statute upon which it is based, * * * are not unconstitutional *per se*, or as applied in this case" (426 F. 2d at 284). Since "the search here in question was made within a reasonable distance of both the American-Mexican boundary and the Pacific Ocean seashore boundary," the officer had "authority under 8 U.S.C. § 1357 to search defendant's automobile without a warrant to determine if aliens were hidden therein" (*ibid.*). "It was only after the car had been lawfully stopped and the hood lawfully opened for this purpose that [the officer] detected the marihuana" (*ibid.*).

Similarly, the Ninth Circuit in *Almeida-Sanchez* sustained a roving patrol search conducted about 25 air miles north of the Mexican border. It stated: "This court has approved the right of Immigration Officers acting under 8 U.S.C. § 1357, 8 C.F.R. § 287.1, to stop and investigate vehicles for concealed aliens within a hundred air miles from any external boundary without a showing of probable cause. * * * Since the

initial search under the rear seat of appellant's automobile was confined to a place where an alien might be concealed, the search was reasonable in scope" (452 F. 2d at 460–461). See also *Kelly* v. *United States,* 197 F. 2d 162 (C.A. 5), upholding a stop and search of a vehicle after it made a U-turn several hundred yards south of a checkpoint in Florida, and *Roa-Rodriquez* v. *United States,* 410 F. 2d 1206 (C.A. 10), holding that a stop and initial search of a vehicle for aliens, conducted near a checkpoint about 90 miles from the border in New Mexico, were lawful, although the search ultimately exceeded its proper scope.

Moreover, the decisions upholding stops and searches for aliens did not distinguish between checkpoint and roving patrol searches. Those involving checkpoints, like those involving roving patrols, were rested broadly upon "the right to stop and investigate vehicles for concealed aliens without a showing of probable cause" (*Duprez* v. *United States,* 435 F. 2d 1276, 1277 (C.A. 9); see also the Ninth Circuit's opinion in *Almeida-Sanchez,* 452 F. 2d at 460–461, quoted above).

Although we now argue in *United States* v. *Ortiz,* No. 73–2050, and *Bowen* v. *United States,* No. 73–6848, that checkpoint searches are significantly different from roving patrol searches insofar as the need for a warrant is concerned, those differences were first given significance by this Court's decision in *Almeida-Sanchez* and particularly Mr. Justice Powell's concurring opinion in that case. Until then, neither the government nor the courts had perceived any constitutionally significant distinction between a stop and search for aliens at a checkpoint and a stop and

search for aliens by a roving patrol. Thus, as the majority of the court of appeals in the present case acknowledged, its opinions sustaining checkpoint searches "do contain some dicta from which the government might infer that this court would uphold a roving-patrol search so long as it was conducted within the 100-mile area defined in 8 C.F.R. § 287.1" (Pet. App. 6a, n. 3).

Both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion in *Almeida-Sanchez* explicitly recognized that the decision was a break with the established law in the courts of appeals. Mr. Justice Powell stated that, "[w]hile the question is one of first impression in this Court," "[r]oving automobile searches in border regions for aliens * * * have been consistently approved by the judiciary" (413 U.S. at 278). Mr. Justice White stated that it "has been the consistent view" of the Ninth Circuit that, "under [8 U.S.C.] § 1357(a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant" (*id.* at 295). Moreover, both the Fifth and the Tenth Circuits "agree with the Ninth Circuit that § 1357(a)(3) is not void and that there are recurring circumstances where, as the statute permits, a stop of an automobile without warrant or probable cause and a search of it for aliens are constitutionally permissible" (*id.* at 296).[12]

[12] Mr. Justice White observed that, "in the 20 court of appeals cases I have noted, including the one before us, 35 different judges of the three courts of appeals found inspection

2. We therefore submit that *Almeida-Sanchez* "was a clear break with the past" (*Desist* v. *United States,* 394 U.S. 244, 248) that presents a choice between retroactivity and non-retroactivity. The 1946 statute, reenacted in 1952, giving immigration officers the power to search vehicles for aliens within a reasonable distance from an external boundary, and the repeated judicial approval both of the statute and of the Border Patrol's exercise of the authority conferred by the statute, constituted "clear past precedent" (*Chevron Oil Co.* v. *Huson, supra,* 404 U.S. at 106), which this Court overruled in *Almeida-Sanchez* with respect to warrantless roving patrol searches.

a. A judicial invalidation of even a previously "untested" statute may be a sufficient break with the past to pose a retroactivity issue. In *Lemon* v. *Kurtzman,* 411 U.S. 192, this Court refused to give retroactive effect to its decision in *Lemon* v. *Kurtzman,* 403 U.S. 602, which had invalidated under the Establishment Clause of the First Amendment a state statutory program to reimburse non-public sectarian schools for certain secular educational services. The appellants had argued that "any reliance whatever by the schools [on the state statute] was unjustified because [the Act] was an 'untested' state statute whose validity had never been authoritatively determined" (411 U.S. at 207).

The plurality opinion responded, however, that "governments must act if they are to fulfill their high

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of vehicles for illegal aliens without warrant or probable cause to be constitutional. Only one judge has expressed a different view" (413 U.S. at 298–299, n. 10).

responsibilities" (*ibid.*), and "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (*id.* at 199).

Just as the state officials in *Lemon* were "entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful" (*id.* at 209), so should federal officials be entitled to rely on a presumptively valid Act of Congress giving law enforcement officers the authority to conduct limited searches without warrants in specified circumstances. In neither case should the officials be required either to "stay their hands" pending judicial ratification or to "risk draconian, retrospective decrees should the legislation fall" (*id.* at 207). As a majority of the Ninth Circuit stated in *United States* v. *Bowen, supra,* "a legally enacted statute becomes law until it is vitiated by a court decision"; it "guides law enforcement personnel and courts until abrogated" (500 F. 2d at 977). "Prior statutory law should be treated no differently from prior case law" (*ibid.*).

The statute here was not declared unconstitutional in *Almeida-Sanchez.* It was, instead, construed "in a manner consistent with the Fourth Amendment" (413 U.S. at 272). The majority of the court of appeals in the present case stated that "[j]udicial interpretation of a statute and departmental regulation to eliminate conflict with the Fourth Amendment hardly qualifies as the kind of 'new' constitutional rule sufficient to deny an appellant the fruits of his appeal" (Pet. App.

9a). We submit, however, that it should make no difference for purposes of retroactivity analysis whether the statute "falls" because it is declared unconstitutional or because it is construed in a way that eliminates constitutional problems but departs from the prior administrative interpretation.[13]

When the official conduct has been based upon a reasonable reading of a statute that was enacted in good faith and is not plainly unlawful, a judicial reinterpretation of the statute to avoid a constitutional infirmity should have no greater retrospective effect than a declaration of unconstitutionality. The ruling may be equally disruptive regardless of the form it takes. In either case retrospective application would "disturb or * * * attach legal consequence to patterns of conduct" that were predicated upon "a different understanding" of the law than "the rule that ultimately prevailed" (*Lemon* v. *Kurtzman, supra,* 411 U.S. at 198, plurality opinion).

b. The ruling in *Almeida-Sanchez,* however, was not simply an interpretation of previously untested legislation. The statute had been tested repeatedly in the courts of appeals, and those courts uniformly sustained the constitutionality of the statute both on its face and as applied by the Border Patrol in circumstances like those involved in this case. The decision in *Almeida-Sanchez* thus overruled a substantial body of case law in the courts of appeals, including the Ninth Circuit.

[13] This Court has already held that a new interpretation of a statute by the Supreme Court that overturns prior lower court interpretations can raise a retroactivity issue. *Chevron Oil Co.* v. *Huson, supra.*

The majority of the court of appeals in the present case thought it was significant that the Ninth Circuit had specifically upheld a roving patrol search, as opposed to a checkpoint search, in only one other case prior to its decision in *Almeida-Sanchez* (Pet. App. 6a and n. 3).[14] As we have shown, however, neither the Ninth Circuit nor any other court had suggested that there might be a constitutionally significant distinction between roving patrol and checkpoint searches, and the rationale of the Ninth Circuit's checkpoint search decisions extended as well to roving patrol searches.

In determining whether a decision has overruled past precedent, one should frame the inquiry with an eye to the "fact[s] of legal life" (*Lemon* v. *Kurtzman, supra,* 411 U.S. at 199, plurality opinion). Dicta in judicial opinions, particularly dicta that appear at the time to be holdings, are clearly among the "hard facts on which people must rely in making decisions and in shaping their conduct" (*ibid.*). Whether a decision presents a retroactivity issue should not depend, therefore, on whether prior judicial statements can be classified, with hindsight and upon a close legal analysis, as dicta rather than holdings. The niceties of *stare decisis* play little part in the planning of official conduct and should be similarly deemphasized in retroactivity analysis.

Moreover, we are unaware of any retroactivity decision that has turned on the *number* of cases that were

[14] This is, indeed, the only basis for distinguishing the result in the instant case from the contrary result in *Bowen.*

overruled. Is the law of a circuit to be viewed as in doubt because an issue has been squarely decided only once or twice? How many times must the court repeat its prior holdings before the law qualifies as past precedent for retroactivity purposes? We submit that one clear holding is enough. If it is overruled, a retroactivity issue is presented.

Nor should it make a difference that the decision "enjoyed only brief acceptance" (Pet. App. 7a) before it was overruled. What matters is whether the overruling was a departure from prior law that was not clearly foreshadowed. Whether prior law had been "accepted" for three years or thirty years may bear on the impact of applying the new rule retroactively and therefore may be relevant in deciding whether to give the rule retrospective effect. But it is the existence, not the age, of prior law that determines whether a retroactivity issue is presented.

That distinction is reflected in the threshold test relied upon by the majority of the court of appeals in this case (see p. 11, *supra*). A retroactivity issue is presented if a decision "overrules clear past precedent * * * or disrupts a practice long accepted and widely relied upon" (*Milton* v. *Wainwright, supra,* 407 U.S. at 381–382, n. 2, Mr. Justice Stewart dissenting). According to that test, it is the "practice," not the "past precedent," that must be "long accepted"; and disruption of "a practice long accepted" is an alternative to the overruling of past precedent. In either event the new decision would present a choice between retroactive and non-retroactive application.

c. The majority of the court of appeals reasoned, however, that "[a] Supreme Court decision overruling state or circuit decisions" does not raise a retroactivity issue unless it also "mark[s] a departure from prior decisions of the Supreme Court" (Pet. App. 10a). We submit that this Court's decisions are to the contrary. They establish, as the dissent stated in this case (Pet. App. 13a–14a) and as the majority of the Ninth Circuit stated in *Bowen*, that "the Supreme Court [need not] reverse itself in order for there to be an overruling of clear past precedent" (500 F. 2d at 976). A retroactivity issue may be presented if a decision of this Court overturns a line of lower court authority.

In *Chevron Oil Co.* v. *Huson, supra,* this Court declined to give retrospective effect to *Rodrigue* v. *Aetna Casualty & Surety Co.,* 395 U.S. 352, where the result would have been to interpose an unanticipated time bar to a personal injury action. The Court reasoned that "*Rodrigue* was not only a case of first impression in this Court * * *, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" (404 U.S. at 107). When the injury occurred and the action was filed, "these Court of Appeals decisions represented the law governing [the plaintiff's] case" (*ibid.*). Since "[i]t cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned," the plaintiff was justified in "rely[ing] on the law as it then was" (*ibid.*). See also *Adams* v. *Illinois,* 405 U.S. 278, 283–284 (plurality opinion).

The decision in *Almeida-Sanchez*, like that in *Rodrigue*, "establish[ed] a new principle of law" (404 U.S. at 106) by overturning the consistent rulings of the Fifth, Ninth, and Tenth Circuits. It thereby "overrul[ed] clear past precedent" and "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" (*ibid.*).[15]

It is no answer to say, as the court of appeals said in the present case, that "[t]he Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration" (Pet. App. 9a). Although the majority of this Court in *Almeida-Sanchez* may have rested its decision upon established principles "never deviated from by the Supreme Court" (*ibid.*), the decision was a novel application of those principles that departed abruptly from the manner in which the courts of appeals had been applying the same principles to similar facts. As the Ninth Circuit stated in *Bowen, supra,* 500 F. 2d at 976, in rejecting the same argument that a different majority accepted in the present case:

> [L]aw enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule.

d. As we have shown, the practice of conducting warrantless searches of vehicles for aliens in the Mexican border area, both at checkpoints and on roving patrols, was followed by the Border Patrol for many decades as an integral part of its law enforcement program. The practice was expressly authorized by Congress in 1946 and was frequently upheld by the lower federal courts. Thus, *Almeida-Sanchez* not only "overrule[d] clear past precedent" in the courts of appeals but also "disrupt[ed] a practice long accepted and widely relied upon" (*Milton* v. *Wainright, supra,* 407 U.S. at 381–382, n. 2) as an important means of enforcing this country's immigration laws. The retroactivity inquiry is thus appropriate under each of the alternate criteria adduced in that formulation, either one of which would alone suffice to require the inquiry.

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[15] *Robinson* v. *Neil*, 409 U.S. 505, relied upon by the majority of the court of appeals in the present case (Pet. App. 10a), is not to the contrary. *Robinson* gave retroactive effect to *Waller* v. *Florida*, 397 U.S. 387, which had barred on double jeopardy grounds successive municipal and state prosecutions for the same or a greater offense. The Court stated that "*Waller* cannot be said to have marked a departure from past decisions of this Court," and "the State's reliance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been given weight in our *Linkletter* line of cases" (409 U.S. at 510). The issue that the Court was addressing in *Robinson*, however, was not whether *Waller* was or was not a new rule, but whether, *as* a new rule, it should or should not be applied retroactively. The decision thus fortifies rather than contradicts the holding in *Chevron*.

C. AS A NEW APPLICATION OF THE EVIDENTIARY EXCLUSIONARY RULE, DESIGNED TO DETER FUTURE VIOLATIONS OF THE FOURTH AMENDMENT, *ALMEIDA-SANCHEZ* SHOULD NOT BE GIVEN RETROSPECTIVE EFFECT

If, as we have argued, the decision in *Almeida-Sanchez* was a new application of the exclusionary rule and therefore presents an issue of retroactivity, this Court's prior decisions make it clear how that issue should be resolved. The decision should be given only prospective effect. *Linkletter* v. *Walker*, 381 U.S. 618; *Desist* v. *United States*, 394 U.S. 244; *Fuller* v. *Alaska*, 393 U.S. 80; *Williams* v. *United States*, 401 U.S. 646.

That is so because the "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved" (*Linkletter* v. *Walker, supra*, 381 U.S. at 637).

The retroactivity determination frequently depends not only on the purpose of the new rule but also on the extent to which law enforcement authorities reasonably relied upon the old standards and on the likely impact that retroactive application would have on the administration of justice. *Stovall* v. *Denno*, 388 U.S. 293, 297; *Desist* v. *United States, supra*, 394 U.S. at 249. This Court has relied heavily on those additional factors, however, "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity" (*id.* at 251). Because the exclusionary rule's "deterrent purpose * * * overwhelmingly supports nonretroactivity" (*ibid.*), the other factors are of only minimal significance in the present context.

We note, in any event, that, for the reasons we have recounted earlier in this brief, it was reasonable for the Border Patrol to rely upon the express authority conferred by statute, together with repeated and consistent judicial approval of routine searches of vehicles for aliens in the border areas. What the Ninth Circuit stated in *Bowen, supra*, with respect to the Border Patrol's operation of fixed checkpoints applies as well, we submit, to its operation of roving patrols (500 F. 2d at 979):

> [I]f the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval, it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified.

Roving patrol traffic checking operations were conducted in complete good faith, in the reasonable belief that they were lawful. Applying the exclusionary rule with respect to pre-*Almeida-Sanchez* searches conducted as part of such operations would not further the rule's deterrent purpose, which "necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right" (*Michigan* v. *Tucker*, No. 73–482, decided June 10, 1974, slip op. 13). It

would merely punish the government and the public, and frustrate the ends of the criminal justice system, because of "the reliance * * * placed, in good faith, on prior law" (*Wolff* v. *McDonnell,* No. 73–679, decided June 26, 1974, slip op. 32).

Moreover, applying *Almeida-Sanchez* retroactively, even if only to "cases pending on appeal on the date the Supreme Court's decision was announced" (Pet. App. 1a), would have a substantial impact upon the administration of justice. There are approximately 40 cases pending in the courts of appeals and a large number pending in the district courts that involve the validity of warrantless roving patrol searches of vehicles conducted prior to June 21, 1973. The outcome of each of those cases may be affected by the retroactive application of *Almeida-Sanchez.* Many more final convictions would be affected if the decision were also applied retroactively in the context of collateral attacks upon final convictions.[16]

Thus, the result is the same under each of the criteria that this Court has applied in determining the retroactivity or non-retroactivity of new rules or new

[16] The court of appeals expressly reserved judgment on that question. We note, however, that this Court has declined to recognize any distinction for retroactivity purposes between final convictions on the one hand and convictions at various stages of trial and direct appeal on the other hand. See, *e.g.*, *Stovall* v. *Denno*, *supra*, 388 U.S. at 300; *Desist* v. *United States*, *supra*, 394 U.S. at 253; *Williams* v. *United States*, *supra*, 401 U.S. at 651–652, 656–659 (plurality opinion); *Michigan* v. *Payne*, 412 U.S. 47, 57, n. 15.

applications of old rules: the decision in *Almeida-Sanchez* should be applied prospectively only.[17]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1975.

[17] The same result would follow, we submit, solely as a matter of exclusionary rule policy. See our brief in *United States* v. *Ortiz*, No. 73–2050, pp. 56–58.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ROBERT PELTIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-19a) is reported at 500 F.2d 985.

JURISDICTION

Petitioner's brief adequately sets forth the basis of jurisdiction.

QUESTION PRESENTED

Whether respondent who, like Almeida-Sanchez challenged on constitutional grounds the validity of the search of his automobile throughout the District Court and Court of Appeals' proceedings, should be afforded the same relief as that previously afforded in this Court's decision in *Almeida-Sanchez* 413 U.S. 266?

STATUTES AND REGULATIONS INVOLVED

Petitioner's brief adequately sets forth the statutes and regulations involved with the addition of the following:

Amendment IV to the United States' Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Facts

On February 28, 1973 at about 2:30 a.m., about one and one-half miles north of the Temecula, California stationary immigration checkpoint, which is about 70 air miles north of the Mexican border, border patrol agents Ainscoe and Pfister were sitting in a vehicle parked perpendicular to the flow of traffic on the center median of Highway 395, observing northbound traffic when respondent drove past at a rate of between 50 and 60 miles per hour. (A. 6-7, 12, 16). ("A" refers to Appendix) The weather was inclement that night as it had been raining on and off all that evening. (A. 13).

The officers pursued respondent's vehicle and pul ed him over because he appeared to be of Mexican descent. (A. 12). The sole basis for the stop, according to border partol agent Ainscoe, was that they thought respondent looked like he was a Mexican man. (A. 12). After the agents observed that there was nothing in the back seat but some clothes, respondent was asked to step back and open his trunk. At the time of the stop the agents noticed the vehicle had Iowa license plates. (A. 7). On his way back to open the trunk of the vehicle, upon questioning, respondent stated that he was coming from San Diego, and en route to Las Vegas. Respondent, although having dark hair and skin[1]

[1] The district court found that, "... apparently he [Respondent] is of French extraction based upon his name, he does look to be dark skinned and at night, that could easily be the case, that he would appear to be of Mexican descent." (A. 23)

(A. 23), was not of Mexican descent. When respondent was opening the trunk one of the agents noticed a tag on the key like those frequently used in repair shops. (A. 8, 20). Respondent, upon further questioning, stated that the vehicle was his. (A. 8).

Upon opening the trunk, the agents observed a number of suitcases and several plastic trash bags. (A. 8). Although it was stipulated by the government that the trash bags were doubled, that is, one bag inside of the other, and although the bags were opaque in color, without holes and the contraband could not be seen through the bags (A. 14, 17) one agent testified that he believed the bags contained marijuana because of the brick shapes in the bags and thereupon reached into the trunk to feel one of the bags. The agent testified that at this point, he was no longer searching for aliens and as he reached into the trunk he smelled marijuana. (A. 15). He then tore open one of the bags and discovered kilo-shaped bricks that looked like marijuana. (A. 11). Respondent was then transported to the U.S. Border Patrol Office, Temecula, California, and released to special agents for further investigation and incarceration.

District Court

Respondent was indicted on March 7, 1973 in the United States' District Court for the Southern District of California, in a one count indictment charging respondent with knowingly and intentionally possessing with intent to distribute approximately 270 pounds of marijuana in violation of Title 21, U.S.C., Sec. 841(a)(1). (A. 4).

Respondent filed a Motion to Suppress the Evidence on the basis that the search was unreasonable, which was heard and denied on May 12, 1973 (A. 1). On May 17, 1973 respondent, upon waiving trial by jury, submitted the case to the District Court on stipulated facts. (A. 1-2). Respondent's stipulation, that he did knowingly and intentionally possess with intent to distribute the 270 pounds of marijuana discovered in his automobile, was conditional and he expressly reserved the right to test the propriety of the ruling on the motion to suppress, and that the stipulation would be withdrawn in the event respondent was able to obtain a reversal on appeal. (A. 31). The court found respondent guilty of the charge against him. Respondent was sentenced on June 25, 1973, four days after this Court's decision in *Almeida-Sanchez*, to imprisonment for one year and one day, with parole eligibility at such time as may be determined by the Board of Parole pursuant to 18 U.S.C. 4208(a)(2) and to a special parole term of two years as prescribed by 21 U.S.C. 841(b)(1)(B). (A. 37-38).

Court of Appeals

Respondent filed a timely Notice of Appeal on July 3, 1973 to the United States Court of Appeals for the Ninth Circuit. (A. 2). Respondent's case was set with several others for an *en banc* consideration by the thirteen active circuit Court judges. On May 9, 1974, based on well established precedent as reviewed in this Court's decision in *Almeida-Sanchez*, respondent's conviction was reversed, and the case remanded to the

District Court with instructions to suppress the evidence seized in the search of respondent's automobile.

The government conceded therein that the evidence must be suppressed if the rule announced in *Almeida-Sanchez* applies to this case. (Pet. App. 2a).

The opinion of the court which consisted of the concurrence of seven judges, determined that Peltier, who like Almeida-Sanchez objected to the violation of his Fourth Amendment constitutional rights should be afforded the same relief as Almeida-Sanchez, because of "the application of principles enunciated by Chief Justice Taft in 1925 in *Carroll* and consistently adhered to by the Supreme Court thereafter." [not because of a claim of] "benefit of any decision overruling or enlarging 'then-applicable constitutional norms,' *Williams v. United States*, 401 U.S. at 654," (Pet. App. 6a).

The Court held that this Court's ruling in *Almeida-Sanchez* should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced (Pet. App. 1a), (although Peltier's case was not yet on appeal at that time in that his judgment of conviction was not entered until four days after this Court's decision in *Almeida-Sanchez*). (A. 2).

The Court citing *Milton v. Wainwright*, 407 U.S. 371, 381-82, n. 2 (1972) (dissenting opinion of Mr. Justice Stewart) determined that the test established in *Linkletter v. Walker*, 381 U.S. 618 at 629 and its successors for determining whether a *new constitutional* doctrine should be applied retroactively or prospectively, should not be applied to *Almeida-Sanchez* because it did not establish a *new constitutional* doctrine, (emphasis added) (Pet. App. 2a-3a) but only

that "it reaffirmed well-established Fourth Amendment standards dating back to *Weeks v. United States*, 232 U.S. 383 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925)." (Pet. App. 4a).

The *en banc* Court of Appeals upon reviewing most of the major decisions of this Court on the issue of retroactivity determined that *Almeida-Sanchez* did not meet the first test for determining whether a decision of this Court establishes a new constitutional rule because it did not 'overrule clear past precedent'. (Pet. App. 4a-5a).

The Court further determined that neither was the second test met because *Almeida-Sanchez* did not disturb a practice long accepted and widely relied upon. (Pet. App. 3a-4a). This was justified, as the Court explained, because "it [the Government] had cited only one of our opinions, prior to our overruled decision in *Almeida-Sanchez*, holding that government agents on roving patrol can stop and search automobiles without either probable cause or warrant. *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970)" (Pet. App. 4a). The Court further concluded that all of its other pre-*Almeida-Sanchez* decisions upholding roving-patrol searches away from the border involved stops which were predicated upon: (a) probable cause to believe that the automobile stopped was carrying illegal aliens or contraband,[2] or (b) a reasonable certainty that any contraband which might be found in or on the vehicle

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[2]See, *e.g.*, *United States v. Ardle*, 435 F.2d 861 (9th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *cf. United States v. Kandlis*; 432 F.2d 132 (9th Cir. 1970).

at the time of the search was aboard the vehicle at the time it entered the United States,[3] or (c) a reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who has just crossed the border illegally.[4] (Pet. App. 5a)

The Court upon a review of the applicable statutes and regulations involved stated, "The government fares no better in its alternate claim that it was relying . . . upon the literal command of Congress and a regulation authorizing such searches." (Pet. App. 5a). The majority concluded that ". . .unless the search qualifies as a border search, the statute should not be read, as this Court has read it, to dispense with the requirement of probable cause as well as the requirement of a warrant." (Pet. App. 6a).

The dissent in the Circuit Court in *Peltier*, consisting of six judges, took the contrary approach and concluded that this Court's decision in *Almeida-Sanchez* did constitute a new rule. Judge Wallace in his dissent

[3]See, *e.g., Alexander v. United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

[4]See, *e.g., United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). The Court, by way of footnote (Pet. App. 4a n. 3), conceded that a number of prior decisions contained some dicta from which it might be inferred that they would uphold roving patrol searches as long as they were within the 100-mile area defined by government regulation 8 C.F.R. § 287.1. See, *e.g., Duprez v. United States*, 435 F.2d 1276, 1277 (9th Cir. 1970); *Fumagalli v. United States*, 429 F.2d 1011, 1013 (9th Cir. 1970); *United States v. Elder*, 425 F.2d 1002, 1004 (9th Cir. 1970), *cert denied* 414 U.S. 869 (1974); *Barba-Reyes v. United States*, 387 F.2d 91 (9th Cir. 1967); *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963); *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961).

held that a decision could overrule clear past precedent even though it did not require the Supreme Court to reverse one of its prior decisions. (Pet. App. 9a).

As evidence that *Almeida-Sanchez* overruled 'clear past precedent,' he cited *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969); and *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

These cases, however, upon review, appear to be inapplicable.[5]

The dissent went on to conclude on the authority of its decision in *United States v. Bowen*, that the identical statute was held to be clear past precedent, and that on the foregoing, based on prior statutory and case law, *Almeida-Sanchez* overruled clear past precedent. (Pet. App. 10a).

The dissenting judges also felt that the second alternative of the test was met in that "The cases, whether or not the language is dicta, are important because they demonstrate a long accepted practice that has been widely relied upon." (Pet. App. 11a).[6]

[5]*United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970), unlike *Almeida-Sanchez* or *Peltier*, involved at least a reasonable suspicion. *Roa-Rodriguez v. United States*, held that contraband found in a jacket located in the trunk of a vehicle stopped by a roving border patrol must be suppressed as it exceeded the agent's authority to search for illegal aliens. *United States v. McDaniel*, unlike *Almeida-Sanchez* or *Peltier* involved a stop and search at a permanent immigration checkpoint.

[6]It is submitted by respondent that this recognition that the prior case law referred to is dicta substantially weakens the dissent's position that *Almeida-Sanchez* overruled "clear past precedent" as established by Circuit Court decisions.

The dissent, citing this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), felt that "[U]nder the *Chevron Oil* formulation of the test, *Almeida-Sanchez* clearly constitutes a new rule[,]" because this issue has not previously been presented to the Supreme Court, making it by definition "... an issue of first impression" before that Court. Second, the resolution of an issue that would invalidate immigration stops and searches was not foreshadowed."[7] (Pet. App. 10a).

The dissent, finding that neither alternative of the test had been met, held that a new constitutional rule was stated in *Almeida-Sanchez*. This being the case retroactivity should be judged by the *Stovall* test. (Pet. App. 12a). That test looked to (a) the purpose to be served by the new standards, (b) the extent of reliance by law-enforcement officials on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. See *Stovall v. Denno*, 388 U.S. 293, 297 (1967). (Pet. App. 2a).

The dissent concluded, "... for reasons similar to those stated in Part II of *United States v. Bowen*, ____ F.2d at ____, I would hold that the retroactivity test would require prospective application in this case." (Pet. App. 12a).

The Fifth Circuit in the case of *United States v. Miller*, 492 F.2d 37 and its progeny have followed the

[7] By applying the dictates to *Chevron Oil* to the present case, the opposite result will, in fact, occur. This Court held, in *Chevron Oil* at 107, that "the most he [respondent] could do was to rely on the law as it then was." In both *Almeida-Sanchez* and *Peltier* following the law as it then was, the searches being without even 'reasonable suspicion' were unreasonable and therefore in violation of the Fourth Amendment.

dissenting approach to the issue of retroactive application of *Almeida-Sanchez*. However, on their reasoning the result in *Peltier* and *Almeida-Sanchez* would be exactly the same had they been heard in the Fifth Circuit. The Fifth Circuit maintains that 'clear past precedent' prior to this Court's decision in *Almeida-Sanchez* required at least a 'reasonable suspicion' under the Fourth Amendment to justify the subsequent search of a vehicle after a stop by a roving patrol.[8] This was lacking in both *Almeida-Sanchez* and *Peltier*.

I.

RESPONDENT WHO, LIKE ALMEIDA-SANCHEZ, CHALLENGED ON CONSTITUTIONAL GROUNDS THE VALIDITY OF THE SEARCH OF HIS AUTOMOBILE THROUGHOUT THE DISTRICT COURT AND COURT OF APPEALS PROCEEDING SHOULD BE AFFORDED THE SAME RELIEF AS THAT PREVIOUSLY AFFORDED IN THIS COURT'S DECISION IN *ALMEIDA-SANCHEZ*.

A. Introduction and Summary.

The Ninth Circuit Court of Appeals concluded that this Court's decision in *Almeida-Sanchez*, by not

[8] See, *United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974); citing *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972); and *Marsh v. United States*, 344 F.2d 317 at 325 (5th Cir. 1965); See also *United States v. Daly*, 493 F.2d 395 (5th Cir. 1974); *United States v. Owen*, 493 F.2d 463 (5th Cir. 1974); *United States v. Byrd*, 494 F.2d 1284 (5th Cir. 1974) citing *United States v. Storm*, 480 F.2d 701 (5th Cir. 1973); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974).

applying a new constitutional rule never reached the question of retroactive or prospective application. It determined that only one of its decisions prior to *Almeida-Sanchez* upheld roving border patrol searches without probable cause, warrant or even reasonable suspicion that contraband or illegal aliens would be found.

The Ninth Circuit in those two cases went so far as to read Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C. 1397(a)(3), literally and without any consideration of Fourth Amendment requirements.

On this basis the Ninth Circuit determined that it had substantially deviated from present constitutional requirements in *Almeida-Sanchez* and that this Court's decision in *Almeida-Sanchez* mandated that the Ninth Circuit conform to constitutional requirements by reading the statute with due regard for Fourth Amendment rights –a concept which is not new in the law. Unlike the Ninth Circuit, however, the Fifth Circuit had never been willing to go that far. They had always maintained that 8 U.S.C. 1357(a)(3) required at least a founded or reasonable suspicion to conduct a search on roving patrol, and that by requiring this they were complying with the Fourth Amendment requirements of reasonableness. Their rationale followed this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The Fifth Circuit in effect was creating a new exception to the probable cause requirement set out in *Carroll v. United States*, 267 U.S. 132 (1925).

Therefore, when the Fifth Circuit read *Almeida-Sanchez* it was viewed as a new constitutional rule, overruling their alleged clear past precedent which

created the exception to the probable cause requirement found in *Carroll*. The Fifth Circuit felt that because they had always conformed to what they determined was reasonable under the Fourth Amendment, *Almeida-Sanchez* requiring probable cause rather than reasonable suspicion for a search was a new rule. It is submitted that their determination that *Almeida-Sanchez* should not be applied retroactively was made on the basis that none of those prior cases involved the rejection of minimal Fourth Amendment safeguards of the defendants. The Ninth Circuit, however, saw the blatant violation of constitutional rights of the defendants through their failure to recognize even minimal Fourth Amendment dictates, and in the few cases in which this occurred, they recognized the need to rectify the injustice and, therefore, held that *Almeida-Sanchez* should be applied to all similar cases pending on appeal.

It is submitted by respondent that it is not a new doctrine that requires all statutes of the country to be subjugated to the dictates of the Constitution as recognized by the Ninth Circuit in *Peltier*. On that basis the decision in *Peltier* should be affirmed. This Court, however, in light of the Fifth Circuit's pre-*Almeida-Sanchez* minimal Fourth Amendment recognition (which recognition was lacking even in Peltier) is being called upon by petitioner to ultimately determine if the Fifth Circuit's prior actions established a clear past precedent sufficient to make the application of *Almeida-Sanchez* to their actions a new rule. Respondent submits that because his search was conducted without the slightest regard for his Fourth Amendment rights, the issue of new or old rule as discussed by the

Fifth Circuit should not even be reached – as under the Fifth Circuit pre-*Almeida-Sanchez* rationale, the evidence would have been suppressed.

B. To determine if this Court's decision in *Almeida-Sanchez* should be applied prospectively or retroactively it should first be determined whether this Court's determination that it is unlawful for a roving immigration officer to stop and search a vehicle without warrant or probable cause within 100 miles of an international border on the primary justification that the driver appears to be of a particular national origin—*overrules clear past precedent—disrupts a practice long accepted and widely relied upon—or decided an issue of first impression whose resolution was not clearly foreshadowed.*

1. The issue of retroactive versus prospective application of a decision of this Court is not reached unless that decision established a new constitutional rule.

The case of *Linkletter v. Walker, supra*, which involved the complete retroactivity of this Court's decision in *Mapp v. Ohio*, 367 U.S. 643, although the first case to announce that decisions affecting constitutional rules in criminal procedure need not be applied completely retroactively (petitioner sought retroactive application on collateral review), never addressed itself to the criteria of what constitutes a new constitutional rule versus 'correcting an aberration'.

It was without dispute in *Linkletter* that the application of the exclusionary rule to state courts as

announced in *Mapp v. Ohio*, 367 U.S. 643 was a new constitutional rule and therefore raised the issue of retroactive or prospective application.

Since *Linkletter v. Walker, supra*, every case that addressed itself to retroactive versus prospective application involved a *new constitutional rule.*[9] See *Milton v. Wainwright, supra.*

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[9] *Linkletter v. Walker*, 381 U.S. 618 (1965), involved the question of retroactive application of the new rule announced in *Mapp v. Ohio*, 367 U.S. 643 (1961), wherein the exclusionary rule was applied to state courts. *Tehan v. Shott*, 382 U.S. 406 (1966), involved the question of retroactive application of the new rule announced in *Griffin v. California*, 380 U.S. 609 (1965) wherein privilege against self-incrimination was violated by prosecution's adverse comment on defendant's failure to testify. *Johnson v. New Jersey*, 384 U.S. 719 (1966), involved the question of retroactive application of the new rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966), wherein in-custody interrogation of defendants was done only with a knowledgeable, intelligent, and voluntary waiver of their constitutional rights. *Stovall v. Denno*, 388 U.S. 293 (1967), involved the question of retroactive application of the new rule announced in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), requiring the presence of counsel at a lineup. *Roberts v. Russell*, 392 U.S. 293 (1968), involved the question of retroactivity of the new rule announced in *Bruton v. United States*, 391 U.S. 123 (1968),wherein co-defendant's right to cross-examination was violated by defendant's confessions at joint trial implicating co-defendant. *Mancusi v. de Forte*, 392 U.S. 364 (1968), involved the *Linkletter* application of the new rule set down in *Mapp v. Ohio, supra*, applying the exclusionary rule to state court proceedings. *De Stefano v. Woods*, 392 U.S. 631 (1968), involved the question of retroactive application of the new rules announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), requiring an unanimous vote for a guilty verdict, and *Bloom v. Illinois*, 391 U.S. 194 (1968), requiring the right to trial in serious criminal contempt cases. This list is far from exhaustive, but the point is presented that the question of retroactive application is only reached if a new constitutional rule is established.

The case of *Almeida-Sanchez, supra*, however, is disputed on that issue and should, therefore, require an analysis of whether it constituted a new rule or merely corrected the aberration of law enforcement officers' illegal conduct.[10]

Reviewing the majority's approach in *Williams v. United States*, 401 U.S. 646, this Court after rejecting retroactive application of *Chimel v. California*, 395 U.S. 752 stated at p. 657, "We would judge the claims in both *Williams* and *Elkanich* by the law prevailing when petitioners were searched."

Using this approach, if the law prevailing at the time of search in *Peltier* did not allow indiscriminate searches and seizures anywhere within 100 miles of the international border on the sole basis that someone appeared to be a Mexican descent, then the retroactivity issue becomes moot, for a new rule would, therefore, not have been stated.

A review of this Court's decision in *Almeida-Sanchez* reveals that it does nothing more than reaffirm the 'law prevailing at the time of the search'.

[10]"An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision over-rules clear past precedent, *e.g., Linkletter v. Walker*, 381 U.S. 618 (1965); *Desist v. United States*, 394 U.S. 244 (1969); or disrupts a practice long accepted and widely relied upon, *e.g., Johnson v. New Jersey*, 384 U.S. 719 (1966); *Stovall v. Denno*, 388 U.S. 293 (1967); *Cipriano v. City of Houma*, 395 U.S. 701 (1969)." *Milton v. Wainwright*, 407 U.S. 371, 381-381, n.2 (1972). (Dissenting opinion of Mr. Justice Stewart.)

Mr. Justice Stewart, in giving the opinion of this Court, concluded that "in the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures." *Almeida-Sanchez v. United States* 413 U.S. 266, 273.

The opinion of this court reviewed the requirements of reasonableness of searches and seizures under the Fourth Amendment before concluding the activity of the Border Patrol agents making roving stops and searches without probable cause or warrant did not come within any presently existing exception from a search warrant, or probable cause and therefore must be disallowed under the long established rule of *Weeks v. United States* 232 U.S. 383, (1914) and *Carroll v. United States* 267 U.S. 132 (1925).

In the present case, like *Almeida-Sanchez*, there did not exist even a "reasonable suspicion" that illegal activity was occurring; on the contrary, in the present case the border patrol agents were acting "on nothing more substantial than inarticulate hunches".[11] This

[11]Under certain well defined circumstances a limited intrusion upon individual freedom may be justified. "And in making that assessment it is imperative that the facts be judges against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? *Cf. Carroll v. United States*, 267 U.S. 132 (1925); *Beck v. Ohio*, 279 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, *e.g., Beck v. Ohio, supra: Rios v. United States*, 364 U.S. 253 (1960), *Henry v. United States*, 361 U.S. 98 (1959)." *Terry v. Ohio*, 932 U.S. 1, 22 (1968).

point was brought out on examination of border patroi agent Charles Ainscoe at Mr. Peltier's hearing on his motion to suppress the evidence (Pet. App. p. 12).

> Q. "Was Mr. Peltier's car just picked at random?
>
> A. "No; Mr. Peltier looked to me like a Mexican When he went by, and I chased him down for that reason; I thought he was a Mexican man."[12]

This court in *Almeida-Sanchez* at page 268 specifically reviewed the "reasonable suspicion" requirement for a "stop" and "frisk" street detention situation found in *Terry v. Ohio* whereby a search warrant was not required, and held that it did not apply to the *Almeida-Sanchez* type stops because the "reasonable suspicion" requirement was lacking.

This court further held that the warrantless search of an automobile without probable cause, not at an international border or its functional equivalent, could not be justified by any previous constitutional precedent involving the search of an automobile.[13]

After a review of those decisions this court held "Automobile or no automobile, there must be probable cause for the search."[14]

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[12]Under the facts of the case at bar, even if it is determined that border patrol agents have authority to make a limited stop for the purpose of determining citizenship, once they discovered upon talking to Mr. Peltier and his identifying himself, that he was not an illegal alien, their authority stopped there. Without probable cause, the subsequent search was unlawful and in violation of Peltier's Fourth Amendment rights.

[13]*Almeida-Sanchez v. United States,* 413 U.S. 266 at 269.

[14]*Id.*

The Government's primary justification for its warrantless stop and search of automobiles devoid of probable cause or even reasonable suspicion was based on administrative inspection cases specifically citing *Camara v. Municipal Court*, 387 U.S. 523; *See v. City of Seattle* 387 U.S. 541; *Colonnade Catering Corp. v. United States* 397 U.S. 72; and *United States v. Biswell* 406 U.S. 311. But that justification too was determined not to be on point where this Court stated, while reviewing *Camara, supra*, "yet the court insisted that the inspector obtain either consent or a warrant supported by particular physical and demographic characteristics of the area to be searched".[15] Unlike the inspector in *Camara*, the Border patrolmen in neither *Almeida-Sanchez* nor *Peltier* obtained consent or a warrant supported by anything.

In distinguishing *Almeida-Sanchez* from the type of search conducted in *Colonnade, supra*, and *Biswell, supra*, this Court differentiated a search of anyone's automobile within 100 air miles of the borders, and a business man who voluntarily engages in a federally licensed and regulated enterprise.[16]

As further evidence that *Almeida-Sanchez* did not establish a new evidentiary exclusionary rule but merely restated long recognized constitutional standards, this court concluded at page 272,

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[15]*Id.* at 270.

[16]Id. at 271 "a central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business."

> "Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and 'within a reasonable distance from any external boundary of the United States'."

Based on the foregoing reasoning this Court ultimately concluded that "In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of unreasonable searches and seizures."[17]

Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez*, after reviewing the government's purported justifications for the search without probable cause or warrant, concluded that "None of the foregoing exceptions to the warrant requirement, then, applies to roving automobile searches in border areas."[18]

Mr. Justice Powell did outline a possible procedure whereby this type of search may be judicially sanctioned through the use of a warrant for an "area search".

However in voting to reverse the conviction of *Almeida-Sanchez* Mr. Justice Powell stated "As no warrant was obtained here, I agree that the judgment must be reversed."[19]

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[17] *Id.* at 273.

[18] *Almeida-Sanchez*, 413 U.S. 266 (Mr. Justice Powell concurring opinion), p. 282.

[19] *Id.* at 285.

Likewise in *Peltier*, 'as no warrant was obtained the judgment must be reversed.'

A review of Mr. Justice White's dissent in *Almeida-Sanchez* fails to lend any credence to the government's claim that *Almeida-Sanchez* set forth a new constitutional rule. Mr. Justice White views the governing standard of the Fourth Amendment to be one of reasonableness.[20] Nowhere in this Court's decision in *Almeida-Sanchez*, the concurring opinion, nor the dissenting opinion is there any discussion of new constitutional rules. The decision is based solely on traditional notions of Fourth Amendment constitutional rights as established over the past 185 years.

2. Several circuit court decisions cannot elevate illegal governmental practices into constitutional guidelines by quoting dicta under the pretense of '*Clear Past Precedent*.'

This Court, prior to *Almeida-Sanchez*, had never addressed itself to the legality of a roving border search without probable cause or a search warrant. One must, therefore, look to the lower court decisions to determine if *Almeida-Sanchez* overruled clear past precedent.

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[20] "As the Court has reaffirmed today in *Cady v. Dombrowski*, *post*, p. 433, the governing standard under the Fourth Amendment is reasonableness and in my view, that standard is sufficiently flexible to authorize the search involved in this case." *Almeida-Sanchez v. United States*, 413 U.S. 266, Justice White dissenting p. 289.

As pointed out, *supra*, the first test for determining if a new constitutional rule has been established is whether 'the decision overrules clear past precedent'.[21] With the exception of one decision prior to this Court's decision in *Almeida-Sanchez* the government is unable to establish *any* past precedent of judicial approval of roving, warrantless, searches of automobiles without probable cause.[22] The petitioner does present a number of cases which purportedly establish some authority albeit by way of dicta, for their position, however, a careful consideration of these cases reveals no clear past precedent for roving warrantless searches of automobiles without probable cause.[23] Of all the cases cited in

[21] See note 10, *supra*.

[22] *United States v. Miranda*, 426 F.2d 383 (9th Cir. 1970). This is the only case directiy on point allowing roving border searches without warrant. However, it may be argued here that considering the totality of the circumstances at least a reasonable suspicion existed in this case after the initial stop, unlike *Peltier*.

[23] *United States v. Anderson*, 468 F.2d 1280, involved a stationery border checkpoint and agents had probable cause to search after smelling marijuana and seeing expended marijuana cigarette in ashtray. *United States v. McCormick*, 468 F.2d 68 *certiorari denied*, 410 U.S. 927 involved a stationary border checkpoint and agents had probable cause to search after erratic approach of vehicle and odor of marijuana. *United States v. Wright*, 476 F.2d 1027, involved a roving search where immigration officers had a reasonable suspicion the vehicle contained aliens. *United States v. McDaniel*, 463 F.2d 129, certiorari denied, 413 U.S. 919, involved a stop and search at a stationary border checkpoint, Court held search reasonable in light of all the facts. *United States v. De Leon*, 462 F.2d 170, *certiorari denied*, 414 U.S. 853, involved stop two miles from border and examination of trunk revealed false bottom. *United States v. Aranda*, 457 F.2d 761 involved a stationary border

petitioner's brief for the proposition that prior circuit court decisions have established 'clear past precedent'

checkpoint where defendants fled after being directed to stop where officers observed the vehicle was hanging low in the back. *United States v. Bird*, 456 F.2d 1023, *certiorari denied*, 413 U.S. 919, involved a stationary border checkpoint. *United States v. Foerster*, 455 F.2d 981, vacated and remanded, 413 U.S. 915 involved a stationary border checkpoint where driver had taken evasive action and drove through checkpoint. *Mienke v. United States*, 452 F.2d 1076 involved a stationary checkpoint. *United States v. Almeida-Sanchez*, 452 F.2d, reversed, 413 U.S. 266. *United States v. Maggard*, 451 F.2d 502 involved a stationary checkpoint where agents had a reasonable suspicion. *United States v. Marin*, 444 F.2d 86 involved a stop 3 miles from the border. *Duprez v. United States* 435 F.2d 1276 involved a stationary border checkpoint where driver had taken evasive action and drove through checkpoint. *Fumagalli v. United States*, 429 F.2d 1011, involved a stationary checkpoint. *United States v. Sanchez-Mata*, 429 F.2d 1391 the nature of the stop cannot be ascertained from the stated facts. *United States v. Avey*, 428 F.2d 1159, *certiorari denied*, 400 U.S. 903 involved a stationary checkpoint and it was determined that custom agents had probable cause to search. *United States v. Miranda*, 426 F.2d 283 is the only case directly on point involving a stop away from the stationary border checkpoint with a subsequent search revealing contraband. *United States v. Elder*, 425 F.2d 1002 involved a vehicle which crossed the international border and because of the surrounding circumstances customs agents had at least a reasonable suspicion that illegal activity may have been accuring. *Roa-Rodriquez v. United States*, 410 F.2d 1206 involved a roving stop and search of a jacket in the trunk of the vehicle which revealed contraband. The Court properly suppressed the evidence. *Valenzuela-Garcia v. United States*, 425 F.2d 1170, involved stop at checkpoint and search of area where alien could not have been hiding. Court suppressed the contraband as the result of an illegal search even though the officer observed the driver to be nervous. *Barba-Reyes v. United States*, 387 F.2d 91 involved a stop at a

only seven cases even involved a roving border search,[24] and out of those seven cases, this court reversed one,[25] two others involved a situation where the immigration officers had at least a 'reasonable suspicion to believe that contraband or illegal aliens were involved,'[26] another decided that the evidence was illegally obtained and must therefore be suppressed (contraband found in jacket pocket in trunk),[27] two cases are distinguishable in that the searches took place within 2-3 miles of the international border,[28] and one case appeared to be

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stationary border checkpoint. *Fernandez v. United States*, 321 F.2d 283 involved stop at stationary border checkpoint and Court held officers had probable cause to search where they smelled marijuana under the hood of the vehicle. *Ramirez v. United States*, 263 F.2d 385 involved a stop at a stationary checkpoint; a search was conducted where defendant was nervous and evasive. *Haerr v. United States*, 240 F.2d 533 involved a stationary checkpoint where defendants evasively drove off after being instructed to pull over to the side of the road, they threw the contraband out of the automobile and there was therefore not even a search. *United States v. King*, 485 F.2d 353 involved a search at a stationary checkpoint.

[24] *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974); *United States v. De Leon*, 462 F.2d 170, *cert. denied* 414 U.S. 853 (1973); *United States v. Marin*, 444 F.2d 86; *United States v. Miranda*, 426 F.2d 283; *Roa-Rodriguez v. United States*, 410 F.2d 1206; and *United States v. Almeida-Sanchez*, 452 F.2d, *reversed* 413 U.S. 266; *Unites States v. Miller*, 492 F.2d 37.

[25] *Almeida-Sanchez, supra.*

[26] *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974); *United States v. Miller*, 492 F.2d 37.

[27] *Roa-Rodriguez v. United States*, 410 F.2d 1206, *cert. denied*, 414 U.S. 853 (1974).

[28] *United States v. De Leon*, 462 F.2d 170, *cert. denied*, 414 U.S. 853; *United States v. Marin*, 444 F.2d 86.

directly on point.[29]

This array of judicial authority falls far short of 'clear past precedent' especially in light of the fact that there are many more cases addressing themselves to the point that at least a 'reasonable suspicion' existed in sustaining an immigration search even at the stationary checkpoints.[30]

3. Substantial Reliance by Immigration Officers on their erroneous interpretation of a statute does not give their resulting illegal activity constitutional justification.

As pointed out earlier herein, the issue of retroactive versus prospective application of a decision of this court is not reached unless that decision at least "disrupts a practice long accepted and widely relied upon".[31]

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[29] *United States v. Miranda*, 426 F.2d 283.

[30] *United States v. Anderson*, 468 F.2d 1280, search based on probable cause; *United States v. McCormick*, 468 F.2d 68 *cert. denied* 410 U.S. 927, search based on probable cause; *United States v. Wright*, 476 F.2d 1027, *cert. denied* 414 U.S. 821 (1974), search based on reasonable suspicion *United States v. McDaniel*, 463 F.2d 129 *cert. denied*, 413 U.S. 919, search held reasonable in light of all the circumstances. *United States v. Aranda*, 457 F.2d 761, at least reasonable suspicion; *United States v. Foerster*, 455 F.2d 981, vacated and remanded, 413 U.S. 915, at least reasonable suspicion; *Duprez v. United States*, 435 F.2d 1276, at least reasonable suspicion; *United States v. Avey*, 428 F.2d 1159, *cert. denied* 400 U.S. 903 (1971), probable cause; *United States v. Elder*, 425 F.2d 1002, *cert. denied* 414 U.S. 869 (1974) at least reasonable suspicion; *Fernandez v. United States*, 321 F.2d 283, probable cause; *Ramirez v. United States*, 263 F.2d 385, at least reasonable suspicion.

This relaince however must be reasonable under the circumstances to have any consequence in the determination of whether this court's decision states a new constitutional rule.

This point was directly addressed in this Court's decision in *Almeida-Sanchez* at page 272 where Mr. Justice Stewart said, "It is clear of course, that no Act of Congress can authorize a violation of the Constitution." Likewise no erroneous interpretation of an act of Congress should give constitutional justification to the resulting illegal activities.

As pointed out so aptly in Respondent's brief in *United States v. Ortiz*, No. 73-2050 at page 79 "although checkpoints have been operating for years, their lack of legal right to exist was recognized by the nation's chief law enforcement officer . . ." in a letter sent by Attorney General Biddle to the Chairman of the House Committee on Immigration and Naturalization wherein he stated in part:

> "In the enforcement of the immigration laws, it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law." H.R. Rep. No. 186, 79th Cong., 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414.

Section 287(a) of the Immigration and Nationality Act of 1952, 66 Stat. 233, 8 U.S.C., 1357(a) must be viewed in light of Fourth Amendment requirements of reasonableness.

Viewing the totality of the circumstances it is arguable that the Fourth Amendment may 'reasonably' allow without a warrant, or even a reasonable suspicion

slight intrusion in personal freedom to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[32] It is submitted that no such exception to the reasonable suspicion requirement has yet been established, *see Au Yi Lau v. I & N.S.*, 445 F.2d 217, *infra.* However, in the present case, when immigration officers determined that Peltier was not of Mexican descent and was a citizen of the United States any further detention or search without probable cause or even a reasonable suspicion went far beyond the reasonableness requirement of the Fourth Amendment and such activity is unsupported by any prior authority of this Court, or even clear past precedent established by inferior tribunals. Any reliance on statutory authority by immigration officers for the right to seize and search a vehicle without probable cause, or reasonable suspicion, without warrant, was an unreasonable interpretation of 8 U.S.C. 1357 a(3) and therefore, unjustified in that both the preceding sections of the same statute had been judicially interpreted to include the Fourth Amendment protections.

Immigration and Nationality Act, §287(a), 8 U.S.C. 1357(a)(1) has been held to contain implied limitations consistent with the constitutional principles set forth in the Fourth Amendment. *Au Yi Lau v. United States Immigration and Nat. Serv.*, 445 F.2d 217 required a reasonable suspicion to enable Immigration officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[33] The case of *Yan Sang Kawi v. INS*, 411 F.2d

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[32]8 U.S.C. 1357(a)(1).

[33]Section 287 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 8 U.S.C. 1357(a)(1).

683 read in the requirement of probable cause to arrest an alien pursuant to the Immigration and Nationality Act, §287(a), 8 U.S.C. 1357(a)(2) reciting the dictates of *Carroll v. United States*, 267 U.S. 132.

It hardly seems reasonable that the government should be required to read subsections 1 and 2 in light of the Fourth Amendment requirements, and then claim that subsection 3 could be reasonably read devoid of any constitutional limitations.

On this basis it is hard to find justification for the activities of the immigration officers in a statute which on its face, without reading in the Fourth Amendment requirements, appears to violate every prior precedent established by this Court relating to the protection of the individual's right to be free of unreasonable search and seizure.

It is also noteworthy that a further reading of the subsection in question (i.e., 1357(a)(3)) permits access to private lands, but not dwellings, only within a distance of twenty-five miles from such external boundary, to prevent the illegal entry of aliens into the United States. It would be illogical to assume that Congress intended to permit major intrusions on Fourth Amendment guarantees up to one hundred miles of the border, (i.e., stopping of a vehicle on open highways and subsequent search, see *Coolidge v. New Hampshire*, 403 U.S. 443), with no safeguards, while prohibiting minor trespasses to lands outside twenty-five miles, unless accompanied by constitutional safeguards. To assume otherwise would be to deny the will of Congress and to reduce the protections of the individual. The public interest in excluding illegal aliens by this means must acknowledgedly be weighed against the rights of

the private citizen, but a search within the literal language of the statute is nonetheless barred if it violates the Fourth Amendment. *Boyd v. United States*, 116 U.S. 616.

Therefore, when read in light of the Fourth Amendment, (which, under all of the circumstances is the only reasonable way of viewing it) the statute does nothing more than give immigration officers authority to conduct a search without a warrant under then existing law as interpreted by *Weeks v. United States*, 232 U.S. 282 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925).

This brings the Court to the point that even if *Almeida-Sanchez* did meet the second test as set out in *Stovall v. Denno, supra*, (disrupts a practice long accepted and widely relied upon) which respondent submits that it does not, such reliance and acceptance was not legally justified.

Simply by virtue of the small number of cases which have addressed themselves to warrantless, roving searches without probable cause, it can be seen that no matter how long the practice has been occurring, there was very little reliance upon it.

On the basis outlined herein there is no jusitification for petitioner's proposition that this Court's decision in *Almeida Sanchez* "disrupts a practice long accepted and widely relied upon".[34]

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[34] *Johnson v. New Jersey*, 384 U.S. 719; *Stovall v. Denno*, 388 U.S. 293; *Cipriano v. City of Houma*, 395 U.S. 701; *Milton v. Wainwright*, 407 U.S. 371, 381-382 n.2 (dissenting opinion of Mr. Justice Stewart).

To hold that *Almeida-Sanchez* states a new evidentiary exclusionary rule based solely on governmental reliance would be to hold that the government can establish legal precedent by its illegal unilateral activities.

4. This Court's decision in *Almeida-Sanchez*, that it is unlawful for a roving immigration officer to stop and search a vehicle without warrant or probable cause, within 100 air miles of an international border on the primary justification that the driver appears to be of a particular national origin, did not *decide an issue of first impression whose resolution was not clearly foreshadowed.*

The recent case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 which is used by petitioner for added justification that *Almeida-Sanchez* decided a new constitutional rule and upon analysis should only be applied prospectively, can be readily distinguished from *Almeida-Sanchez*.

Chevron Oil Co. v. Huson, supra, involved the question of retroactive or prospective application of *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969) which overruled a long line of Circuit Court decisions and held that state law and not admiralty law applied under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331 et. Seq.[35]

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[35]*Chevron Oil Co. v. Huson*, 404 U.S. 97 at 107. "*Rodrique* was not only a case of first impression in this court under the Lands Act, but it also effectively overruled a long line of decison by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applied through the Lands Act. See *e.g., Price Oil Co. v. Snipes*, 293 F.2d 60; *Movible Offshore Co. v. Ousley*, 346 F.2d 870; *Loffland Bros. Co. v. Roberts*, 386 F.2d 540.

This Court, in refusing to give retroactive application to Rodrique, stated of respondent, "The most he could do was to rely on the law as it then was."[36]

Like Huson, Peltier is relying 'on the law as it then was.'

Therefore, if this Court were to view *Almeida-Sanchez* in light of *Rodrique* the result would still be exactly the same.

It is apparent that none of the technical guidelines for prospective or retrospective application as set out in the prior decisions of this Court discussed herein do anything more than reaffirm the fact that *Almeida-Sanchez* establishes no new constitutional rules, but simply rectifies a point of divergent governmental activity which has defied the explanation of legal scholars and law professors in recent years.

C. Applying Mr. Justice White's dissenting opinion in *Almeida-Sanchez* to Peltier, lacking reasonableness, the evidence seized as a result of the search must be suppressed.

Mr. Justice White, in his dissent is *Almeida-Sanchez* after reviewing the facts of *Almeida-Sanchez* and the prior case law on the subject concluded "... the governing standard under the Fourth Amendment is reasonableness, and in my view, that standard is sufficiently flexible to authorize the search in this case."[37]

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[36]*Id.*

[37]*Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion) at 289.

The facts in *Peltier* do not comport to the reasonableness standard as set out by Justice White in his dissenting opinion in *Almeida-Sanchez.*

The highway on which Almeida-Sanchez was stopped was "about the only north-south road in California coming from the Mexican border that does not have an established checkpoint." [Because of that,] "it is commonly used to evade check points by both marijuana and alien smugglers."[38] By way of footnote, Mr. Justice White went on to explain, "west of Glamis the prevaling direction of the highway is east-west. At the point of the stop west of Glamis, the highway is only approximately 20 miles north of the border, running parallel to it. . . ."[39] Unlike the stop in *Almeida-Sanchez*, Peltier was not on a highway which, because it lacked a stationary checkpoint, was more commonly used by marijuana and alien smugglers. On the contrary, this road did have a stationary checkpoint.[40]

Unlike the stop in *Almeida-Sanchez*, Peltier was not on a road 20 miles from the Mexican border. On the contrary, Highway 395 is one of only three major roads leading out of the second largest city in California, and Mr. Peltier was more than 70 air miles north of the Mexican border,[41] and over 50 miles north of San

[38]*Id.* at 286.

[39]*Id.* at 286 n.2.

[40]Appendix, p. 7, Transcript of Hearing on Motion to Suppress. "Q: Now, there is a stationary checkpoint in the Temecula area, is there not;" "A: From time to time, yes."

[41]Id. "Q: And was Mr. Peltier, at the time you saw him, or at the place that you saw him, would he have been north of that checkpoint?" "A: Yes, he would have been north of where the checkpoint normally is . . . ." "THE COURT: How far is that from the border?" "THE WITNESS: The checkpoint is about seventy miles from the border, sir, air miles."

Diego. Highway 395 does not even go to the Mexican border, but terminates in the middle of downtown San Diego. Every person in San Diego wishing to travel to central or northern California inland must take this road. Likewise, every person wishing to take the most direct route to the mid-western United States would travel over this same spot where Peltier was stopped.

In *Almeida-Sanchez* "Petitioner's identification revealed that he was a resident of Mexicali, Mexico, but that he hald a work permit for the United States. Petitioner had come from Mexicali, had picked up the car in Calexico, and was on his way to Blythe to deliver it. He intended to return to Mexicali by bus."[42] By way of footnote, at page 286, Mr. Justice White further reveals, "It appears, see App. 12, 13, that the officers were informed of these facts before initiating any search for aliens and hence before finding any contraband.[43]

Unlike *Almeida-Sanchez*, the immigration officers upon stopping Peltier and prior to the search learned that Peltier was not a resident of Mexico, nor was he coming from Mexico.[44] In fact, upon these observations, Mr. Peltier was in the exact same position as any one of the million plus residents in San Diego County

[42]*Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion at 286.

[43]*Id.* at 286 n. 3.

[44]Pet. App. p. 8 Transcript of Hearing on Motion to Suppress. "Q: All right. Now, what happened after you asked Mr. Peltier to open the trunk?" "A: He got out of the car; on the way back to the trunk, I asked him where he was coming from. He replied, I believe, San Diego. I saked him where he was going; he said, Las Vegas. . . ."

who at one time or another traveled north on Highway 395.

Mr. Justice White in his dissent in *Almeida-Sanchez* reviewed the decision of *United States v. McDaniel*, 463 F.2d 129 wherein at p. 297 he stated:

> "Judge Goldberg, with Judge Wisdom and Judge Clark, was careful to point out, however, that the authority granted under the statute must still be exercised in a manner consistent with the standards of reasonableness of the Fourth Amendment. 'Once the national frontier has been crossed, the search in question must be reasonable under *all* of its facts, only one of which is the proximity of the search to an international border.'" [Citation omitted.]

Peltier confronts this Court with the very issue presented by Mr. Justice White in his dissent in *Almeida-Sanchez* where at page 299, by way of footnote, he states:

> "The United States does not contend, see Tr. of Oral Arg. 29, and I do not suggest that any search of a vehicle for aliens within 100 miles of the border pursuant to 8 CFR §287.1 would pass constitutional muster. . . ."

Mr. Justice White concluded that "The clear rule of the circuit, is that conveyances may be stopped and examined for aliens without warrant or probable cause *when in all the circumstances it is reasonable to do so.*'"[45] (Emphasis added.)

Even if this Court should determine that a causeless stop of a vehicle for the sole purpose of questioning

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[45]*Almeida-Sanchez v. United States*, 413 U.S. 266 (Mr. Justice White dissenting opinion) at 298.

persons in the vehicle concerning their right to be or remain in the United States is not unreasonable under the Fourth Amendment, it is submitted that any search thereafter *without even a reasonable suspicion* that aliens or contraband may be found far exceeds the bounds of reasonableness under the Fourth Amendment to the Constitution of the United States.[46]

Based on the foregoing, following the rationale set out in the dissenting opinion in *Almeida-Sanchez*, the search of Mr. Peltier's trunk, unlike *Almeida-Sanchez*, in light of all of the circumstances, was unreasonable, and therefore in violation of his Fourth Amendment rights and protections.

D. Clear past precedent, prior to this Court's decision in *Peltier* has established that *Almeida-Sanchez* should be applied to all similar cases pending on appeal at the time of this Court's decision in *Almeida-Sanchez*.

This Court in *Peltier* is being asked for the first time whether this Court's decision in *Almeida-Sanchez* should be applied to all similar cases pending on appeal at the time of *Almeida-Sanchez*.

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[46]The government cites *United States v. Miller*, 492 F.2d 37, pending on petition for a writ of certiorari, No. 73-6975, for authority that *Almeida-Sanchez* should not be applied retroactively. However, that case differs substantially from *Peltier* on the facts, in that in Miller the border patrol officers "noticed a strong odor of marihuana" while inspecting the interior of the automobile. *Id.* at 39. This in itself could possibly establish a reasonable suspicion, which was lacking at the time of the search in *Peltier*.

The Fifth,[47] Ninth,[48] and Tenth Circuits[49] have all reviewed this point and they have all come to the same conclusion-- cases pending on direct appeal at the time of this Court's decision in *Almeida-Sanchez* will have the evidence suppressed which was the result of a roving border search of a vehicle where the search lacked, a warrant, probable cause or at least a reasonable or founded suspicion that contraband or illegal aliens would be discovered.

Although the three Circuits addressing themselves to the application of *Almeida-Sanchez* to cases pending on appeal come up with different rationales the result as applied to *Peltier* would be exactly the same.

The Ninth Circuit as can be seen from the instant case holds that *Almeida-Sanchez* does not state a new rule as applied to roving border searches, therefore cases pending on appeal must conform to the *Almeida-Sanchez* doctrine.[50]

The Tenth Circuit, like the Ninth, holds that *Almeida-Sanchez*, not stating a new constitutional rule must apply the doctrine to cases pending on direct

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[47]*United States v. Speed*, 497 F.2d 546 (5th Cir. 1974); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974); *United States v. McKim*, 487 F.2d 305 (5th Cir. 1973); *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973).

[48]*United States v. Ojeda-Rodriguez*, 502 F.2d 560 (9th Cir. 1974); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1973); *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1973).

[49]*United States v. King*, 485 F.2d 353, 357 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 361, 363 (10th Cir. 1973).

[50]See also *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1973) cert. granted, 413 U.S. ____.

appeal on the date of the decision in *Almeida-Sanchez*. See *United States v. King*, 485 F.2d 353 (10th Cir. 1973) and *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973).

The Fifth Circuit, although achieving the same result through another means, now contends that *Almeida-Sanchez* declared a new constitutional rule.[51] In the case of *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974) after determining that *Almeida-Sanchez* was a case of first impression in the Supreme Court as set forth in this Court's decision in *Chevron Oil Co. v. Huson, supra*, the Court refused retroactive application. The facts in *Miller*, however, and all other Fifth Circuit roving-patrol cases are determinative of their holding contrary to the cases in the Ninth and Tenth Circuits. *Miller's* conviction was sustained on appeal based on pre-*Almeida-Sanchez* law as applied in the Fifth Circuit. Unlike the Ninth Circuit, the Fifth Circuit has continuously maintained prior to *Almeida-Sanchez*, that a roving-patrol vehicle search must conform to minimal standards of reasonableness as set down in the Fourth Amendment. This point has been reviewed on numerous occasions where the Fifth Circuit Court stated in *United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974) at 169:

> "This Court has recently determined, however, that the constitutional enlightenment provided by *Almeida-Sanchez* should not be applied to the

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[51]The Fifth Circuit originally was in conformance with the Ninth and Tenth in applying *Almeida-Sanchez* retroactively. See *United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973) rehearing 494 F.2d 1284 (5th Cir. 1974); *Unites States v. Speed*, 489 F.2d 478 (5th Cir. 1973), rehearing 497 F.2d 546 (5th Cir. 1974); *United States v. McKim*, 487 F.2d 305 (5th Cir. 1973).

analysis of official action occurring prior to the date of that opinion. *United States v. Miller*, 1974, 492 F.2d 37."

The Court qualifies this statement, however, in footnote 2 on page 170, where it states:

"We wish to emphasize in this respect that *Miller* cannot be read as approving every stop and search conducted by border patrol agents within 100 miles of an external boundary prior to June 21, 1973, the date of the opinion in *Almeida-Sanchez*. This Court has explicitly recognized, even before that landmark Supreme Court decision, that Fourth Amendment considerations would necessarily limit the constitutional scope of 8 U.S.C. §1357 and its attendant regulations."[52]

[52]The following is the balance of the text of note 2 at page 170 in *Unites States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974). "[P]roximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements. We would find it peculiar, for example, if massive searches were permissible in downtown Cleveland or Buffalo on the basis of a 'border search' theory. Therefore, while 'border search' is a convenient phrase to describe a reasonableness standard for searches pursuant to the customs and immigration laws, it is not sufficiently internally descriptive to justify automatically the reasonableness of all searches conducted for customs and immigration purposes within a certain proximity to national borders." *United States v. McDaniel*, 5th Cir. 1972, 463 F.2d 129.

In *Marsh v. United States*, 5th Cir. 1965, 344 F.2d 317, this Court ordered suppression of the fruits of an alleged border search conducted 63 miles from the border, noting that: "[I]f the Government seeks to qualify the action as a geographically 'extended' border search, it must show at least the circumstances known to the officers at the border which reasonably justified

This Fourth Amendment requirement in roving searches as applied prior to *Almeida-Sanchez* can again be seen in *United States v. Daly*, 493 F.2d 395 (5th Cir. 1974). The Court after reviewing the facts concluded ". . . the search met the test of reasonable suspicion; it need not reach the level of a search on probable cause. *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir. 1966), cert denied, 385 U.S. 977, 87 S.Ct. 517, 17 L.Ed. 2d 439; *United States v. Tsoi Kinan Sarg*, 416 F.2d 306 (5th Cir. 1969); *Walker v. United States*, 404 F.2d 900 (5th Cir. 1968)." at 397. The same result was achieved in *United States v. Byrd*, 494 F.2d 1284 (5th Cir. 1974); *United States v. Greene*, 496 F.2d 1317 (5th Cir. 1974); and *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974).

On this basis the Fifth Circuit although contending that *Almeida-Sanchez* does not apply retroactively, would have achieved the same result in the instant case because the search in *Peltier* lacked even the 'reasonable suspicion' required by the Fifth Circuit's application of the Fourth Amendment.

As an aside, with the Fifth Circuit's own recognition that pre-*Almeida-Sanchez* case law required application of the Fourth Amendment to Section 287(a) of the Immigration and Nationality Act 66 Stat. 233, 8 U.S.C. 1357(a) it can hardly be argued that 'clear past precedent allowing roving patrol searches without even a reasonable suspicion' was overturned by the Court's

the request relayed to officers in the interior. Any other doctrine would render travelers who had recently entered this country subject to almost unlimited arrest and search without any cause save the simple request of a border officer to one at an interior point. In our view this cannot be squared with the test of reasonableness under the Fourth Amendment." 344 F.2d at 325.

decision in *Almeida-Sanchez*. The Circuit Courts primarily affected by the decision in *Almeida-Sanchez*, although through varying rationale, have unanimously and unequivocally determined that any cases pending on appeal at the time of this Court's decision in *Almeida-Sanchez*, where a roving border patrol conducted a search without at least 'reasonable suspicion', must be reversed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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